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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. _____

THE STATE OF ARIZONA, Petitioner,

vs.

JANICE WHITTINGHAM and
GREG WHITTINGHAM, Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS,
STATE OF ARIZONA
DIVISION ONE, DEPARTMENT A

TO: The Honorable Chief Justice and Associate Justices of the United States Supreme Court.

Your petitioner prays that a writ of certiorari issue to reverse the opinion and order of the Court of Appeals of the State of Arizona, Division One, Department A, in the case of State of Arizona v. Whittingham entered on the 21st day of March, 1974.

OPINION BELOW

The opinion of the Court of Appeals of

Arizona has been reported in 19 Ariz. App. 27, 504 P. 2d 950(1973) and appears in the Appendix hereto.

JURISDICTION

The judgment and opinion of the Court of Appeals was rendered on January 9, 1973, and a timely motion for rehearing was denied on February 27, 1973. Thereafter, a petition for review to the Arizona Supreme Court was granted on Arpil 3, 1973. On January 22, 1974 the Arizona Supreme Court entered an order vacating their order granting the petition for review and simultaneously denying said petition. The Court of Appeals' mandate was then handed down on the 21st day of March, 1974. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1257(3).

QUESTIONS PRESENTED

1. Is the possession of an hallucinogenic drug as part of a purported religious practice constitutionally protected under the First Amendment of the United States Constitution even though the possession of such drug is prohibited by the criminal laws of the State of Arizona?

2. In meeting a defense based upon religious freedom under the First Amendment of the United States Constitution must the State of Arizona prove that a drug is addictive or that its use has caused death or insanity as opposed to proof that the drug is a potentially dangerous substance in that its use could cause convulsions, hallucinations, delusions,

illusions, psychotic reactions or death in order to demonstrate an overriding and compelling public interest in lawfully prohibiting the use and possession of such drug?

3. May the Arizona Court of Appeals give preference to a particular religion in violation of the First Amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant portions of Article III and the First Amendment of the United States Constitution, 28 U.S.C.A. § 1257(3), and A.R.S. § 36-1061 are attached as Appendix A.

STATEMENT OF THE CASE

On October 14, 1969, agents of the Department of Public Safety, while investigating drug and narcotic offenses in northern Arizona, proceeded to Parks, Arizona, and in particular, to the property owned by Andrew Scott. (TR I, p. 8) The agents were working undercover, having long hair, beards and mustaches, and were posing as students at Northern Arizona University. (TR I, p. 8 & 9) They went to this particular property based upon information they had received from informants. (TR I, p. 7 & 9) While there they met Mr. Scott at his residence and informed him they were interested in experiencing the use of mescaline and that was their motivation for being there. They were informed that peyote would be present and available at a meeting to be held on Mr.

Scott's premises the night of October 18, 1969. (TR I, p. 59, 61, 79, 80, 81; Vol. III, p. 432) Mr. Scott invited the agents to attend this meeting and told them a ten dollar donation was requested. (TR I, p. 80) It was subsequently learned that Mr. Scott had mailed written invitations to non-Indians, non-members in Coconino County, Arizona inviting them to attend the meeting and requesting a ten dollar donation. (TR III, pp. 431 & 432) The alleged purpose of the meeting was the marriage ceremony of the Respondents and another couple.

On the afternoon of October 18, 1969, three different agents of the Department of Public Safety went to Mr. Scott's property. They asked Mr. Scott about the meeting to be held there that evening, and asked if they could attend. When asked why, they told Mr. Scott they were curious. At the time Mr. Scott was putting something into a blender, and not only readily identified it as peyote, but gave the agents some sample slices when asked. The agents also observed at this time, several people coming in and out and freely removing the cut up slices of peyote. As the agents were leaving, Mr. Scott warned them to be careful or they could be arrested if caught with the peyote. (TR II, pp. 307 - 309; TR III, pp. 394 & 395) It should be noted here that at no time did any of the agents who asked to attend the gathering at Parks, Arizona express any religious interest in the gathering. To the contrary, the only expression at all was as a Northern Arizona University student who was either idly curious or wanted to experience the use of drugs. (TR I, p. 61)

On the night of October 18, 1969, agents of the Department of Public Safety and other law enforcement officers went to Mr. Scott's premises. (TR I, p.10) They surrounded a hogan located on the premises and several agents entered, after being allowed to do so by Mr. Scott. (TR I, p.14, 15, 16, 17; TR II, p.336) The remaining officers stayed outside. There were approximately fifty (50) people present in the hogan. (TR I, p.20)

After the agents inside the hogan observed numerous individuals, including the respondents, possess and ingest peyote, a signal was given to the officers waiting outside and they entered and placed all of the individuals inside under arrest. (TR I, p. 29 through 37)

The respondents were subsequently charged criminally with a violation of A.R.S. § 36-1061, and the matter came on for trial on March 15, 1971.

Respondents defended this criminal charge on the basis that they were engaged in a bona fide religious ceremony of the Native American Church and their actions in possessing and ingesting peyote were constitutionally protected under the free exercise clause of the First Amendment of the United States Constitution. Petitioner countered this defense on the basis that the ceremony in which respondents participated was not a bona fide religious ceremony of the Native American Church and that even if it were, this drug was potentially dangerous to the safety, health and welfare of the people of the State of Arizona and therefore the State had a sufficient interest in the protection of its citizens to prohibit the possession of peyote, even though

such prohibition would infringe upon respondents' religious practices.

Unlike any other meeting of the Native American Church, that was testified to by all the expert witnesses, Indian and otherwise, the meeting at Parks, Arizona was made up of primarily non-Indians. Counting the members of the "road crew" who conducted the meeting, there were only a few Indians present. It was shown that a large number of these non-Indians were obviously not sincere participants as evidenced by their general conduct of laughing, joking and talking during what was said to be a period of prayer in the ceremony and by stuffing their pockets with peyote during the meeting. (TR II, pp. 296, 297, 314, 343) This was not an isolated occurrance, since they obviously had had this problem in the past as evidenced by Mr. Scott's instructions that the participants were to ingest all the peyote they took and were not to fill their pockets with peyote and remove it from the premises. (TR II, pp. 270, 312, 313)

During the course of the trial there was a great deal of expert and quasi-expert testimony. Respondents called three Indians from Oklahoma who were officers or long standing members of the Native American Church of Oklahoma. Each one of these individuals testified essentially that peyote was important to their religion and that it was an American Indian religion. None of these witnesses, except Ralph Turtle, had ever been to a meeting where, as here, there were more non-Indians than Indians present, and this meeting was held on Mr. Scott's premises. None of these three individuals, Fred Hoffman, Sam Buffalo or

Ralph Turtle testified with regard to the harmful effects or possible harmful effects of peyote. (TR IV, pp. 691-706; TR V, pp. 778-801)

The Indian members of the Native American Church called by petitioner testified without exception that the Native American Church is an American Indian religion, and that they had never been to a meeting where there were more non-Indians than Indians. Two of these witnesses, Mr. Nez and Mr. Clark, were asked if they had seen anyone die, become crazy or psychotic at any meeting of the Church they had attended. To this narrow question, they responded in the negative. (TR VI, pp. 910-923)(Unnumbered volume of transcript, pp. 3-18)

The prime defense witness called by respondents was Dr. Omar Stewart. A brief perusal of Dr. Stewart's testimony reveals that the peyote religion, The Native American Church, is an American Indian religion and that the meetings are always attended by more Indians than non-Indians. The number of non-Indians who might be present at a meeting compared to Indians is always a very small ratio. Possibly one, two, or seven being the most, never as occurred here, however, when out of approximately fifty (50) people there were only fifteen (15) Indians. (TR IV, pp. 560-691) (TR IV, specifically p. 676)

Dr. Stewart, a purported expert on the peyote religion and therefore knowledgeable in its significance to the "Indians", testified that it was perfectly alright to give out free samples of

peyote to anyone, even if they were just curious about its taste. (TR IV, p.671) He also testified that it is perfectly proper and acceptable practice to use peyote at times other than a "meeting" or "ceremony". He stated that it was used in many ways, such as, if a person has a cold he might take a little peyote and so on. (TR IV, p.669)

Of even more significance, however, was Dr. Stewart's testimony that he, himself, had passed peyote out to some students in his home. See TR IV, at 647, lines 14 through 21 where Dr. Stewart testified:

> "... I had two, two experiences with eating peyote in my home that were not really services, but other graduate students who were curious about the effects -- and twice, once in Washington, D.C., and once in Berkeley, we ate peyote at -- during an evening with friends. Once in Washington -- the last time was in Washington, during World War II when I was there."

See also, TR IV, pp. 648-651.

Dr. Stewart stated that when he used peyote he had visions, specific scenes, and at all times he had color visions. (TR IV, pp. 646 & 647)

From Dr. Stewart's point of view, membership in the peyote religion or the Native American Church is attained merely by having faith in the peyote and confidence in its powers. (TR IV, p. 661)

Dr. Stewart, however, did not consider himself a member of the religion. (TR IV, pp 673 & 674)

Dr. Stewart testified that there were reports of death and insanity attributed to peyote. (TR IV, pp. 603, 604 and 674) He did attempt to explain that the physician signing the death certificate did not attribute the deaths to peyote, however, his Indian informants believed the cause to be peyote.

It should be noted here that Andrew Scott testified he had seen mothers feed peyote to their infants. (TR III, p. 441)

The most significant testimony, which was uncontroverted, with regard to the effects of peyote and its dangerous potential, was that of Dr. Maurice Seevers, Professor and Chairman of the Department of Pharmacology of the University of Michigan Medical School, who was called to testify on behalf of petitioner. Dr. Seevers testified to a series of experiments he ran using peyote and mescaline. Some of these experiments were done with humans. The experiments with peyote to determine toxicity and what a lethal dose would be were performed with a series of dogs. (TR VI, pp. 824 & 825) Essentially a dog was given repeated doses and the effect on his central nervous system observed, such as, vomiting, convulsing or other such activity. Mescaline and peyote are convulsants and the vomiting caused by peyote is its reaction on the central nervous system. (TR VI, pp. 825-831) From these experiments a rough lethal dose of peyote was determined and

from that a comparison made to man. (TR VI, pp. 834 & 835) Thus, the lethal dosage for an average man was extrapolated. (TR VI, p. 839) The deaths caused in the experimental animals were due to convulsions, or the direct effect of the drug on the central nervous system. (TR VI, p. 901)

While mescaline is the principal active ingredient in peyote, there are other alkaloids present. Even Dr. Stewart was aware of them. (TR IV, p. 651) While, as Dr. Seevers testified, not enough work had been done at that time to determine definitely the overall effect of these alkaloids, there is every good indication that danger is potentially greater from the alkaloids contained within peyote. One substance, lophophorine, killed the animal within three minutes after injection. In any event, they are much more toxic than mescaline. (TR VI, p.850) Dr. Seevers, like Dr. Stewart, also had heard of deaths in humans caused by peyote.

It was Dr. Seevers' observation, supported by the testimony of respondents' own witnesses, that peyote would and does produce hallucinations, delusions, illusions and other psychotic behavior such as manic depressive and so forth. (TR VI, pp. 857-860) These responses were observed by Dr. Seevers in humans as the result of experiments conducted using mescaline, the principal ingredient of peyote.

Based upon his experience, knowledge, background and these experiments, Dr. Seevers felt

that peyote was properly classed under the Omnibus Bill as a Schedule 1 drug as stated in TR VI, page 866, to-wit:

> "Schedule 1 involves drugs which have three broad characteristics. They have a high potential for abuse, they have no established medical use, and they are not considered to be safe even by a physician's administration."

(See TR VI, p. 867) Put another way it was Dr. Seevers' opinion, uncontroverted by any other evidence at TR VI, page 872, that peyote was potentially dangerous for human consumption.

> "...Yes, this substance, in my opinion, is potentially dangerous because it is capable -- primarily because it is capable of producing distortions of perception. Any individual who has a distortion of perception -- in other words he misinterprets sensory phenomena that come in to him from all different sources -- is potentially a dangerous individual to himself and to society."

The purpose of Dr. Seevers' testimony was to demonstrate the inherent danger of peyote and to reinforce the basis upon which the Arizona Legislature determined that peyote was a drug dangerous to the health, safety and welfare of the people of this State and worthy of criminal

prohibition.

The Superior Court of Coconino County, on May 24,1971 found the respondents guilty of the charge of unlawful possession of peyote. A copy of that Court's decision is included as Appendix B. Respondents perfected their appeal of this decision to the Arizona Court of Appeals and that Court on January 9, 1973 rendered its opinion reversing the decision of the Coconino County Superior Court. A copy of the Court of Appeals Opinion is included as Appendix C. Petitioner filed a motion for rehearing of the Court of Appeals decision which motion was denied by said Court on February 27, 1973. (See Appendix D) Petitioner then filed a petition for review of the Court of Appeals decision in the highest court of the State, The Arizona Supreme Court. The petition for review was granted by the Arizona Supreme Court on April 3, 1973. (See Appendix D) Thereafter, on January 22, 1974, The Arizona Supreme Court, without issuing an opinion, vacated its order granting the petition for review and entered an order denying the petition for review. (See Appendix D) This action, in effect, let stand as the law of the State of Arizona the decision of the Court of Appeals. On March 20, 1974, the Court of Appeals entered its final order and mandate. (See Appendix D)

HOW THE FEDERAL QUESTIONS ARE PRESENTED

Respondents' defense to the criminal prosecution was based on the free exercise clause of

the First Amendment to the Constitution of the United States. The whole tenure of the testimony and evidence presented on behalf of the defense was to this effect. As was noted heretofore, respondents called several American Indians to testify as to the Native American Church. Their principal witness, Dr. Omar Stewart, testified regarding the authenticity and origins of the religion. The respondents of course both testified they considered themselves members of the Native American Church. The purpose of the defense testimony and the assertion of the religious protection argument became increasingly clear as the trial progressed. See TR III at 478 and 479 where defense counsel Cogen made the following objection to cross-examination of one of the respondents:

> "MR. COGEN: Your Honor, I'm going to object, the introduction of personal names, addresses of her parents. I don't think that has any bearing on her personal beliefs, on the sanctity of this relationship, on the deepness of her religious convictions, on whether or not this was a church, on anything else that's at issue in this case, and it's beyond the scope of cross, beyond the scope of direct."

And in final argument by defense counsel Mangum, TR VII at 950 and 951:

> "Your Honor, as we construe the posture of the case, I think this is one that has a shifting burden of proof. I think it was incumbent upon the State in the first instance to show possession, then on the defense to show the religious issue, and on the State to try to rebut that to show a danger such that the State had an overwhelming need to protect the public from the danger which was posed to it.
>
> Now, directing comments to each one of those elements, I see no reason to argue the question of possession. I think that is conceded. We are saying that it was a protected possession under the religious freedom argument." (Emphasis added.)

Both petitioner and respondents' post trial memoranda were directed to this defense and to the questions presented here. (See Appendixes E, F, and G)

The questions that were presented and argued in the Court of Appeals of Arizona in respondents' appeal from their conviction were based upon this Constitutional challenge to petitioner's regulation of peyote through A.R.S. § 36-1061. These questions were, as outlined in petitioner's answering brief. (See Appendix H at 108a):

"1. May the State of Arizona Enjoin the Possession of Peyote When It is Put to Nondrug Use in Bona Fide Religious Ceremonies of the Native American Church?

* * * *

"3. Does the State of Arizona have an overriding and compelling public interest in the enforcement of A.R.S. § 36-1061, which supersedes and overrides any Constitutional, First Amendment, Religious Freedom arguments?"

The Court of Appeals' decision(Appendix C) reversed the trial court's well reasoned opinion. The appellate court did not confine itself to the previously recognized narrow limits of exemption for the Native American Church but has now gone further and has said at 25a:

"Therefore, in a prosecution for an alleged violation of A.R.S. § 36-1061 it is a defense to that prosecution to show that the peyote was being used in connection with a bona fide practice of a religious belief; that it was an integral part of the religious exercise; and that it was used in a manner not dangerous to the public health, safety or morals. ..."

Thereafter, petitioner filed a motion for rehearing (Appendix D) which pointed out to the Court that its reversal of the convictions and declaration of unconstitutionality of the criminal statute A.R.S. § 36-1061 as it applies to the peyote religion was a violation of the First Amendment and the Establishment Clause. That motion was denied. Petitioner's subsequent petition for review to the Arizona Supreme Court was ultimately denied. (See Appendix D) and the Court of Appeals' opinion is now the law of the State of Arizona.

REASONS FOR GRANTING THE WRIT

The decision below not only conflicts with applicable decisions of this Court and decisions of Federal Courts of Appeals but it presents a question of substance not heretofore determined by this court.

The decision in State v. Whittingham, 19 Ariz. App. 27, 504 P.2d 950(1973) is in direct conflict with the decisions of this Court in Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244(1878); Davis v. Beason, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637(1890); and Cantwell v. State of Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). It also conflicts, essentially, with this Court's decision in Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2nd 965 (1963). This Court has said in Reynolds, supra, at pages 166 and 167:

> ". . . Laws are made for the government of actions, and while they

> cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances. ..."

And in Davis, supra, at 300 and 301:

> "... The first amendment to the constitution, in declaring that congress shall make no law respecting the establishment of religion or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. . . . It was never intended or supposed that the amendment could be invoked as a protection against legis-

lation for the punishment of acts inimical to the peace, good order, and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subject of punitive legislation. ...

* * *

"... It is assumed by counsel of the petitioner that, because no mode of worship can be established, or religious tenets enforced, in this country, therefore any form of worship may be followed, and any tenets, however destructive of society, may be held and advocated if asserted to be a part of the religious doctrines of those advocating and practicing them. But nothing is further from the truth. While legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as 'religion.' "

See also Cantwell, supra, at 303 and 304:

> "... Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts, — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. ..."

It should be noted that none of the aforecited cases deal with religious practices as they encompass dangerous or potentially dangerous drugs.

To date the only cases dealing with religious practices and beliefs and the use of drugs are State court decisions and several Circuit Court of Appeals' decisions. The opinion of the Arizona Court of Appeals conflicts sharply with such decisions as Leary v. United States, 383 F.2d 851 (5th Cir. 1967), reversed on other grounds, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57(1969), United States v. Hudson, 431 F.2d 468(5th Cir.1970)cert. den. 400 U.S. 1011, 91 S.Ct. 575, 27 L.Ed.2d 624; Kennedy v. Bureau of Narcotics and Dangerous Drugs, 459 F.2d 415 (9th Cir. 1972) cert. den. 409 U.S. 1115, 93 S.Ct. 901, 34 L.Ed.2d 699, Reh. den. 410 U.S. 959, 93 S.Ct. 1414, 35 L.Ed. 2d 959 (1973).

United States v. Kuch, 288 F.Supp. 439,

35 A.L.R.3d 922(D.C.,D.C. 1968) and United States v. Spears, 443 F.2d 895, cert. den. 404 U.S. 1020, 30 L.Ed.2d 669, 92 S.Ct. 693(1971).

The Court in Leary, supra, was faced with the same defense as was used in the decision below; that the use of marijuana was protected by the free exercise clause of the First Amendment to the Constitution. The only difference being the drug used. The Court said at 860:

> "Here the paramount Government interest in the enforcement of the laws relative to marihuana is the protection of society. ..."

As will be hereinafter shown the court below requires petitioner to prove that peyote is a dangerous or potentially dangerous drug. The Court in Leary, supra, said at 860 and 861:

> "Congress has made it a crime to traffic in marihuana and it was not incumbent upon the Government to produce evidence to controvert the testimony of witnesses on the controversial question whether use of the drug is relatively harmless. ..."

And finally at page 861:

> "...Congress has demonstrated beyond doubt that it believes marihuana is an evil in American society and a serious threat to its people.

It would be difficult to imagine the harm which would result if the criminal statutes against marihuana were nullified as to those who claim the right to possess and traffic in this drug for religious purposes. For all practical purposes the anti-marihuana laws would be meaningless, and enforcement impossible. The danger is too great, especially to the youth of the nation, at a time when psychedelic experience, 'turn on,' is the 'in' thing to so many, for this court to yield to the argument that the use of marihuana for so-called religious purposes should be permitted under the Free Exercise Clause. We will not, therefore, subscribe to the dangerous doctrine that the free exercise of religion accords an unlimited freedom to violate the laws of the land relative to marihuana."

In Hudson, supra, the Court said simply at 469:

"... the use of drugs as part of religious practice is not constitutionally privileged. "(Emphasis added)

21 C.F.R. 320.3(C)(3) provides in part:

"The listing of peyote in this subparagraph does not apply to non-

drug use in bona fide religious ceremonies of the Native American Church;
..."

From an adverse ruling by the Director of the Bureau of Narcotics and Dangerous Drugs in an attempt to amend 21 C.F.R. 320.3(C)(3), supra, an appeal was taken to the Ninth Circuit Court of Appeals. At pages 416 and 417, the Court in Kennedy, supra, said:

"The sole governmental interest to be served by regulating the use of peyote is the protection of the health of the citizens by controlling the manufacture, sale, and use of dangerous or potentially dangerous drugs.

"The Government asserts that peyote is a dangerous drug. We assume for the purpose of this decision that the Government is right. We are nevertheless unable to perceive that any of the distinctions that the Government draws between the members of the Native American Church and the rites of the church and the members of the Church of the Awakening and its rites have any bearing on the legitimate Government end to be served. We cannot say that the Government has a lesser or different interest in protecting the health of Indians than it has in protecting the health of non-Indians. We cannot

> say that the Government's interest in a church member's health increases or diminishes depending upon whether his ingestion of a dangerous drug is of greater or lesser importance in the religious ceremonies of his church. It follows that the exemption regulation creates an arbitrary classification that cannot withstand substantive due process attack. ..." (Citations omitted)

Essentially the same argument as was made in Leary, supra, was made in Kuch, supra. While the sincerity of the individual's belief was highly questionable under the circumstances, the Court for purposes of argument accepted them as true. The Court discussed the protection afforded by the First Amendment at 445 and 446:

> "Defendant misconceives the Constitution and the decisions when she claims in effect an unbridled right to practice her beliefs. The public interest is paramount and if properly determined the Congress may inhibit or prevent acts as opposed to beliefs even where those acts are in accord with religious convictions or beliefs. If individual religious conviction permits one to act contrary to civic duty, public health and the criminal laws of the land, then the right to be let alone in one's belief with all the spiritual peace it guarantees would be destroyed in the resulting break-

> down of society. There is abroad among some in the land today a view that the individual is free to do anything he wishes. A nihilistic, agnostic and anti-establishment attitude exists. These beliefs may be held. They may be expressed but where they are antithetical to the interests of others who are not of the same persuasion and contravene criminal statutes legitimately designed to protect society as a whole, such conduct should not find any constitutional sanctuary in the name of religion or otherwise."

The Court then discussed its duty when considering the legislative enactment and the religious freedom defense. See page 448:

> "The Court is not required nor would it be proper to substitute its judgment for that of the Congress. It is only necessary to examine the facts to determine whether in view of the restriction which the Marihuana Tax Act places on the acts of members of the Neo-American Church, Congress had a rational basis for the enactment and whether there continues to be a substantial basis for its continued enforcement. This is something quite different from what Kuch seeks for she would have the Court determine that those

> who feel marihuana is practically harmless and even socially beneficial have the better of the argument over those who feel the drug is harmful and socially most undesirable. The Court is not the legislature and the legislature has spoken. It is sufficient to determine and the Court so finds that Congress had a rational basis for passing the Act . . ."

The Court then noted at page 448:

> " 'To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if * * * it furthers an important or substantial governmental interest. * * * ' " (Citation omitted)

The decision below not only conflicts with these aforecited decisions but goes far beyond any previously recognized exemption. The Arizona Court has said in Whittingham, supra, at 31:

> "Therefore, in a prosecution for

> an alleged violation of A.R.S. § 36-1061 it is a defense to that prosecution to show that the peyote was being used in connection with a bona fide practice of a religious belief; that it was an integral part of the religious exercise; and that it was used in a manner not dangerous to the public health, safety or morals. ..." (Citation omitted)

In arriving at this conclusion, the Arizona Court not only had to substitute its judgment for that of the Arizona Legislature, but, in grasping for straws to enable it to circumvent the uncontroverted medical testimony which it recognized, had to dispense with established criteria and has now adopted a new test. The Arizona Court now requires that before petitioner may prohibit or regulate the use of a dangerous drug it must show that it is addictive. The reasoning used is that addiction might cause a financial burden on the State through economic maintenance of the addict. This simply has never been the criteria in showing the requisite governmental interest to meet a religious freedom argument. See Kuch, supra. Now in Arizona all that is necessary to circumvent a criminal prosecution for possession or use of peyote is that it be used in the practice of a religious belief.

In all of the instances where exemptions have been recognized by the courts for the use or possession of peyote, or by regulation such as 21 C.F.R. 320.3, supra, there is one factor which has been

glaringly predominate. It is best exemplified by footnote 11 to the Court's opinion in Leary, infra, at 861:

> "The Federal Commissioner of Food and Drugs has exempted peyote from use in bona fide religious ceremonies of the Native American Church. (Citation ommitted) But this would hardly justify our holding, as appellant contends, that the criminal statutes against marihuana are unconstitutional because of religious discrimination. The exemption accorded the use of peyote in the limited bona fide religious ceremonies of the relatively small, unknown Native American Church is clearly distinguishable from the private and personal use of marihuana by any person who claims he is using it as a religious practice." (Emphasis added)

A distinction was also made by the Leary court from the California case of People v. Woody, 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P. 2d 813 (1964), as did Kuch, supra, that the Native American Church is an organization of American Indians.

It thus becomes clear that what the courts and the Bureau of Narcotics and Dangerous Drugs were doing was recognizing an exemption for the Native American Church simply because in the words of Leary, supra, it was "limited", "relatively small", "unknown" and was a "religious organization of American Indians."

What occurred in the instant matter points out with extreme clarity what has been the concern of petitioner all along.

As will be hereinafter pointed up, there can be no valid exception for any small, limited, unknown Indian organization, nor was there under Arizona law as it was applied prior to the decision below.

What occurred on October 18, 1969 in Parks, Arizona was a gathering of people, predominately non-Indians, who had gathered together, many for no better reason than idle curiosity or to experience the use of mescaline or peyote. Certainly not for a religious purpose. The demeanor and actions of the many participants bore this out. (Laughing, joking, talking during periods of prayer, and the stuffing of the peyote in pockets.) Even prior to the start of the gathering, slices of peyote were being freely given out completely unconnected in any way with any so-called religious ceremony. From an exemption that was recognized for a small, unknown American Indian organization, you now have an uncontrolled gathering of anyone who happens by. (Invitations were even sent out to known non-members.) Membership is accomplished by simply being there, and religious interest or sincerity makes no difference. (It can be noted here by the Court that the Indians have become concerned about this problem and some groups have passed resolutions to limit membership to American Indians. (See Dr. Stewart's testimony, TR IV, p. 663)

While the court below relied heavily on the exemption provided by 21 C.F.R. 320.3, supra, yet they went far beyond the narrow confines of that exemption. Here there is no limitation whatsoever. The prosecution and anyone can now use this dangerous drug.

As was shown in Kennedy, supra, even the narrow exemption of the small, unknown Indian organization is invalid and cannot withstand a substantive due process attack. Obviously, the greatly expanded exemption by the Court below cannot either.

This equal protection problem was recognized by this Court as far back as Reynolds, supra, where the Court said concerning the religious argument for polygamy at 166:

> "... those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do must be acquitted and go free. This would be introducing a new element into criminal law. ..."

Allowance of an exception to prosecution for use of a drug for religious purposes and not for non-religious use must of necessity encounter the same problem.

If it is constitutionally protected on the one hand for a person to use a drug as dangerous or as potentially dangerous as peyote in connection with the practice of a religious belief simply be-

cause it is not addictive, then how would it be possible to not allow the use of marijuana in the practice of a religious belief since it too is not addictive, (See Leary, supra, at 858 n.8), or for that matter, LSD or any number of other drugs. Under these circumstances, Leary, Kuch, Hudson, Spears and Kennedy, supra, would have had to be decided differently.

Not only does the decision below present a problem of denial of equal protection, but it violates the First Amendment, prohibiting the establishment of Religion. Quite simply, it violates that clause by giving preference and aiding the peyote religion over all others. While the Court was speaking of legislative enactments in Everson v. Board of Education of Ewing Tp., 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711, 168 A.L.R. 1392, reh. den. 330 U.S. 855, 67 S.Ct. 962, 91 L.Ed. 1297 (1947), it follows that what may not be done through legislative enactments may not be done through a court's legislative decision.

Petitioner's purpose is not to infringe or prohibit a religious practice, but is to control and prohibit the use of a dangerous or potentially dangerous drug which is subject to abuse as was shown here.

There is a broad spectrum of decisions ranging all the way from Woody, supra, to Reynolds, supra, and now into the confusing melee is thrown the Arizona Court's opinion. Because of this confusion and conflict, and because of the reoccurring and prevalent drug problem of today, these very important questions should now be decided by this

Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the order and opinion of the Court of Appeals, State of Arizona, Division One, Department A.

Respectfully submitted,

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The Attorney General

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and

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19 June 1974

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APPENDIX A

United States Constitution, Article III, § 2:

"Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; ..."

United States Constitution, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; ..."

28 U.S.C.A. 1257:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

A.R.S. § 36-1061:

"A person who sells, furnishes or gives away, or offers to sell, furnish or give away, or has in his possession peyote (Pellote), botanically known as Lophophora Williamsii, or Agava Americana, commonly known as the mescal button, or any compound, derivative or preparation thereof, is guilty of a misdemeanor."

APPENDIX B

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCONINO

THE STATE OF ARIZONA, Plaintiff, -vs- JANICE WHITTINGHAM and GREG WHITTINGHAM, Defendants.	NO. 5650 MEMORANDUM OPINION AND JUDGMENT

On October 18, 1969 a group of over forty people, some of whom appeared to be Indians and others non-Indians, gathered together in a building on the property of one Andrew Scott situated in the Town of Parks, Coconino County, Arizona in an area not within the boundaries of an Indian Reservation. The purpose of the meeting was to perform a religious ceremony to bless the marriages of the defendants Janice Whittingham and Greg Whittingham and another couple. The couples had been previously married in civil proceedings in the State of California. Although neither Mr. or Mrs. Whittingham appeared to be of Indian descent, Mrs. Whittingham testified, without rebuttal, that her grandfather was a full-blooded Blackfoot Indian.

During the ceremony at Parks, police officers arrested those present, including the Defendants Whittingham, who were subsequently

charged with having violated Section 13-1061, Arizona Revised Statutes, which prohibits the possession of peyote.

The defendants defend primarily upon the groundthat at the time of their arrest they were engaged in a bona fide religious ceremony of the Native American Church of Parks, Arizona, and that their activity would thus be protected under the First Amendment to the Constitution of the United States which guarantees religious freedom.

The plant "Lophophora Williamsii" is a small cactus, which apparently grows only in certain areas of Texas, as well as northern Mexico. The plant produces peyote, which grows as small buttons at the top of the cactus.

The practice of using peyote, or what is termed peyotism, can be traced to the early Sixteenth Century among the inhabitants of Mexico. The practice later spread among the Indians of Texas and Oklahoma and, in the last decade, peyotism has been practiced among various American Indian Tribes from California to Wisconsin and Oklahoma to Canada.

The parent peyote church was chartered in approximately 1918 in the State of Oklahoma, as the Native American Church. This was later changed to the Native American Church of the United States and subsequently to the Native American Church of North America. Since that time, many branches of the church have been established or have established themselves,

some with formal charters from parent organizations and others without such documents.

The Native American Church has always been primarily an "Indian religion" by reason of its origin and in the context that substantially all of its members are American Indians. However, membership to persons who are not members of Indian Tribes or do not have Indian heritage, is usually not refused.

Andrew Scott first became interested in the Native American Church in approximately 1954, through his uncle who was part Cherokee Indian. A number of years later, at the request of a number of Navajo Indians, Mr. Scott began construction of a church building in Parks, Arizona. The building was constructed as to size and configuration in conformity with the usual practices of the Native American Church. The church, designated by Mr. Scott as the Native American Church of Parks, Arizona, claims its authority through the Oklahoma church, although no official charter was ever issued to Mr. Scott.

There is no admission charged for those who wish to attend meetings in Parks, Arizona, although donations are graciously accepted.

A "meeting" is the proper and accepted designation of a ceremony of the Native American Church, which convenes and continues from sundown to sunrise. A meeting is conducted and presided over by a group of experienced persons (usually Indians) known as a "Road Crew", led

by a "Road Chief". Although a meeting is characterized by prayer, singing and the ritualistic use of a drum, fans, an eagle-bone whistle, a rattle and the mutual smoking of hand-rolled cigarettes by the congregation, the primary and central event consists of the use and ingestion of peyote. The peyote is, in fact, central and primary to the ceremony. It is considered to be a sacred symbol, or divine plant around which the entire service is organized. The congregation prays to and through the peyote, which is ingested by the members of the congregation in the form of greens, peyote tea, ground buttons and more recently capsules containing the ground substance. A bona fide ceremony cannot take place without the presence of peyote. The principal active ingredient in peyote is mescaline, a hallucinogenic drug. When taken internally, peyote can produce temporary hallucinations or what might be described as bizarre alterations of sensory perception, resembling symptoms of psychotic behavior. These include the observance of kaleidoscopic colors, geometric patterns or scenes depicting people and places.

In addition to these psychological effects, peyote can cause vomiting by reason of its bitter taste and it is for this reason that the substance is often ground and placed in capsules prior to ingestion.

In acting upon the central nervous system, peyote can also result in convulsions and ultimately death. The evidence presented at the time of trial in the within cause did not establish,

however, any documented incidents of death or insanity among humans who had ingested peyote. The plant is properly described as a "hallucinogen" and is not a narcotic or habit forming substance.

The Court finds that the ceremony conducted in October, 1969 at Parks, Arizona substantially followed the recognized form of a service of the Native American Church and was conducted and presided over by a Road Crew and Road Chief who had traveled from the Navajo Indian Reservation for that purpose.

The Court further finds that the purpose of the ceremony was to bless the marriage of the Defendants Whittingham and another couple. Additionally, the Court finds that the Defendants Whittingham were serious and sincere participants in what they considered to be a ceremony having religious significance, which was conducted for the purpose of blessing their marriage.

Finally, the Court finds that during the course of the ceremony the defendants, and each of them, possessed and ingested peyote.

The Constitution protects the right to have, and also the right to express religious beliefs. It does not, however, blindly grant the same absolute protection for acts performed in the name of religion. One's constitutional freedom to practice religious beliefs are not absolute if such practice involves drug-related conduct made criminal by law.

The defendants' claim of religious exemption should be honored only if a substantial state interest will not thereby be frustrated in a significant way.

To characterize the quality of the governmental interest which must appear, the courts have used a variety of descriptive terms: compelling; substantial; subordinating; paramount; strong and others. Whatever the definition, it is clear that a government regulation is sufficiently justified if it furthers an important or substantial government interest.

The ultimate question presented to this Court, therefore, is whether there is a compelling or substantial interest permitting the Legislature of the State of Arizona to infringe upon the defendants' First Amendment rights to freedom of religion.

By reason of the distortions of perception caused by the ingestion of peyote, together with the other possible psychological and physiological results described earlier in this memorandum, the substance is subject to abuse and could conceivably result in a person being dangerous to himself or to the person or property of others. There is enough of a danger in peyote to qualify as a compelling interest of the State in upholding a valid statute prohibiting its possession.

The Court finds that the goal of preserva tion of public health, safety and order is of a sufficient interest to society and that the use of the hallucinogenic vegetable known as peyote may thus be right-

fully prohibited.

The possibility of misuse or abuse of peyote is somewhat graphically illustrated by testimony that during the ceremony at Parks, Arizona, certain members of the congregation were observed placing handfuls of peyote capsules in their pockets.

It is true that the use of peyote in bona fide religious ceremonies of the Native American Church is exempted under Federal Food & Drug Regulations. Also, the Bureau of Indian Affairs has legalized peyote for religious use on certain Indian Reservations, including the Navajo Reservation. Further, certain states have, by statute, legalized peyote for religious use. Is this to be construed, however, as indicating that the Legislature of the State of Arizona is obligated to enact such laws? Can it be said that the failure to do so is in derogation of the rights of its citizens, if the Legislature has acted consistent with the good order, peace and safety of the people of the State of Arizona?

It is not unusual, especially in the field of drug abuse, for laws to vary from state to state. Standards vary from community to community. Conduct which is not acceptable to society in one state is often tolerated in another. But this is not a valid reason for the courts to usurp the powers of the Legislature in attempting to set public policy.

The doctrine of separation of powers be-

tween the judicial, executive and legislative branches of our government should be adhered to in the true spirit of the founders of this country. This is an essential feature of constitutional government.

Certainly it is the obligation of the courts to interpret our laws within the framework and meaning of our Federal and State Constitutions, but as individual constitutional rights should be jealously guarded, so should the rights of our legislative bodies to enact laws which have a reasonable relationship to the peace, order and welfare of society.

In this time when congestion in our courts is impeding criminal justice, both as to the interests of the prosecution and the defense, it would be unfortunate if the judiciary were to improperly and unnecessarily assume the burden of determining in each of hundreds, or perhaps thousands of cases, whether or not an individual's use of a psychedelic vegetable, such as peyote, was a bona fide religious use protected by the First Amendment or whether such professed intent was merely a guise for illegal use.

Within the jurisdiction of the State of Arizona, pursuant to the provisions of A.R.S. 13-1061, the possession or use of peyote, by any person, irrespective of race, color of skin, or religious preference or belief, is contrary to law. Whether that should be the law, or whether the law should be modified in any respect, is a matter of public policy for determination by the Legislature.

Based upon the evidence presented at the time of trial and the Court having further considered the arguments and memoranda of counsel, it is the judgment of this Court that the defendants JANICE WHITTINGHAM and GREG WHITTINGHAM are guilty of possession of peyote, a misdemeanor, as charged in the Information.

IT IS ORDERED denying the various motions made by the defendants during the course of trial, upon which a ruling was reserved by the Court with respect to the admissibility of evidence and the lawfulness of the arrest of the defendants.

DONE IN OPEN COURT this 24th day of May, 1971.

s/ J. Thomas Brooks

J. Thomas Brooks, Judge of the
Superior Court, Division 2

By direction of the Court, copy of the foregoing Memorandum Opinion and Judgment mailed this 24th day of May, 1971, to:

William A. Flick, Chief Deputy
County Attorney, Coconino County,
P. O. Box 1237, Flagstaff, Arizona 86001.
Attorney for The State of Arizona;

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P. O. Bin 10, Flagstaff, Arizona
Attorney for Defendants

BILLIE YOST, Clerk of the
Superior Court

By s/Jo Wycoff
Deputy Clerk

APPENDIX C

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 443
v.	)	DEPARTMENT A
JANICE WHITTINGHAM and GREG WHITTINGHAM, Appellants.	)	

Appeal from the Superior Court for Coconino County Cause No. CR-5650
The Honorable J. Thomas Brooks, Judge
REVERSED

Gary K. Nelson, The Attorney General — Phoenix
By James R. Redpath and Roderick G. McDougall
Assistants Attorney General
Attorneys for Appellee

Mangum, Wall & Stoops — Flagstaff
By Richard K. Mangum
Attorneys for Appellants

DONOFRIO, Presiding Judge

Appellants were convicted of a violation of A.R.S. § 36-1061, possession of peyote, a misdemeanor. They appealed, seeking a determination from this Court as to whether their convictions violated the First Amendment of the United States Constitution which guarantees the free exercise of freedom of religion. The charges, subsequent arrest, and convictions stem from a raid led by undercover agents of the Department of Public Safety on a hogan located at Parks, Arizona, in Coconino County on October 18, 1969 in which the defendants-appellants were present and admitted ingesting peyote in a milieu which they allege was a bona fide ceremony in a Native American Church convened for the purpose of blessing their marriage.

At the conclusion of a lengthy Superior Court trial the judge, as trier of fact, took the matter under advisement and subsequently, on May 24, 1971, issued a memorandum opinion adjudging the guilt of the defendants. We are taking the liberty of quoting in haec verba from the trial judge's memorandum opinion as it sets out quite succinctly the facts he determined:

> "On October 18, 1969 a group of over forty people, some of whom appeared to be Indians and others non-Indians, gathered together in a building on the property of one Andrew Scott situated in the Town of Parks, Coconino County, Arizona in an area not within the boun-

daries of an Indian Reservation. The purpose of the meeting was to perform a religious ceremony to bless the marriages of the defendants Janice Whittingham and Greg Whittingham and another couple. The couples had been previously married in civil proceedings in the State of California. Although neither Mr. or Mrs. Whittingham appeared to be of Indian descent, Mrs. Whittingham testified, without rebuttal, that her grandfather was a full-blooded Blackfoot Indian.

"During the ceremony at Parks, police officers arrested those present, including the Defendants Whittingham, who were subsequently charged with having violated Section 13-1061, Arizona Revised Statutes, which prohibits the possession of peyote.

"The defendants defend primarily upon the ground that at the time of their arrest they were engaged in a bona fide religious ceremony of the Native American Church of Parks, Arizona, and that their activity would thus be protected under the First Amendment to the Constitution of the United States which guarantees religious freedom.

* * * *

"The Native American Church has always been primarily an 'Indian religion' by reason of its origin and in the context that substantially all of its members are American Indians. However, membership to persons who are not members of Indian Tribes or do not have Indian heritage, is usually not refused.

* * * *

"A 'meeting' is the proper and accepted designation of a ceremony of the Native American Church, which convenes and continues from sundown to sunrise. A meeting is conducted and presided over by a group of experienced persons (usually Indians) known as a 'Road Crew', led by a 'Road Chief'. Although a meeting is characterized by prayer, singing and the ritualistic use of a drum, fans, an eagle-bone whistle, a rattle and the mutual smoking of hand-rolled cigarettes by the congregation, the primary and central event consists of the use and ingestion of peyote. The peyote is, in fact, central and primary to the ceremony. It is considered to be a sacred symbol, or divine plant around which the entire service is organized. The congregation prays to and through the peyote, which is ingested by the members of the

congregation in the form of greens, peyote tea, ground buttons and more recently capsules containing the ground substance. A bona fide ceremony cannot take place without the presence of peyote.

* * * *

"The Court finds that the ceremony conducted in October, 1969 at Parks, Arizona substantially followed the recognized form of a service of the Native American Church and was conducted and presided over by a Road Crew and Road Chief who had traveled from the Navajo Indian Reservation for that purpose.

"The Court further finds that the purpose of the ceremony was to bless the marriage of the Defendants Whittingham and another couple. Additionally, the Court finds that the Defendants Whittingham were serious and sincere participants in what they considered to be a ceremony having religious significance, which was conducted for the purpose of blessing their marriage.

"Finally, the Court finds that during the course of the ceremony the defendants, and each of them, possessed and ingested peyote." (emphasis supplied)

We have reviewed the voluminous record carefully and have determined that the evidence does support the findings set out above. Therefore, given this background, we must answer the appellee's issue presented on appeal, namely, whether the use of peyote in the bona fide pursuit of religious faith was constitutionally protected by the First Amendment of the United States Constitution which is binding upon Arizona. Arizona Constitution, Art. 2, Sec. 3. It is the opinion of the Court that the question raised on appeal must be answered in the affirmative. Therefore the convictions of these defendants must be reversed.

It is well settled that the First Amendment right to freedom of religion grants an individual the right to the free exercise of his chosen religion without governmental intervention or interference unless a "compelling state interest" in regulation that is contravening to the religious practice is proven. SHERBERT v. VERNER, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed. 2d 965 (1963); WEST VA. BOARD OF EDUCATION v. BARNETTE, 319 U.S. 624, 87 L.Ed. 1628, 63 S.Ct. 1178, 147 A.L.R. 674 (1943). In order to reach the issue of a compelling state interest, state regulation must be of the nature and quality so as to preclude or prohibit the free exercise of religion.

In the interest of brevity we have not discussed the historical aspects of Peyotism, botanical information regarding the origins of the peyote plant, or the hierarchy of the Native American Church. The record is saturated with evidence on these subjects.

In analyzing the competing interests of the parties to this action we must emphasize that the record, and the trial court's findings, made several determinations in which Peyotism was found to be an established religion of many centuries' history. Suffice it to say, therefore, that Peyotism is not a twentieth century cult nor a fad subject to extinction at a whim. Most of the members who testified at trial, e.g., were active participants in the Native American Church and had been for years, in fact, in many instances, for decades. The religion is established with a following of several hundred thousand believers.

Perhaps the most cogent proof that the religion is a vibrant force today, and will most likely continue to be, is the fact that the federal government has recognized that Peyotism is a legitimate religious practice and has made an exception for the use of peyote in Peyotist ceremonies on reservations. At the present time several jurisdictions 1/ have, by legislative enactment or judicial decree, also permitted the use of peyote for sacramental purposes. It was also established that the use of peyote during a "meeting" is a central force and the theological basis of Peyotism. Peyote constitutes, in and of itself, an object of worship. Without it the sacraments of the Native American Church are obliterated. Therefore, it seems apparent from the record that believers who worship at the Native American Church cannot freely exercise their religious beliefs absent the use of peyote.

1/ New Mexico, Montana and Iowa by statute; California by case decisions, see infra.

The Court must next determine whether there is a substantial threat to public safety, order or peace resulting from the use of peyote. On the basis of the record before the Court, which we highlight below, we believe that the State failed to sustain its burden of proof upon this issue. The Attorney General contended that § 36-1061, A.R.S., possession of peyote, is a reasonable legislative exercise of the police power in that the mescaline contained in peyote can produce hallucinations, delusions and other deleterious effects upon humans. In that regard, at trial both sides made a complete record concerning the effects of peyote. Again, we are fortunate to have the findings of fact by the trial judge on this issue. They are:

> "The principal active ingredient in peyote is mescaline, a hallucinogenic drug. When taken internally, peyote can produce temporary hallucinations or what might be described as bizarre alterations of sensory perception, resembling symptoms of psychotic behavior. These include the observance of kaleidoscopic colors, geometric patterns or scenes depicting people and places.
>
> "In addition to these psychological effects, peyote can cause vomiting by reason of its bitter taste and it is for this reason that the substance is often ground and placed in capsules prior to ingestion.
>
> "In acting upon the central nervous

system, peyote can also result in convulsions and ultimately, death. The evidence presented at the time of trial in the within cause did not establish, however, any documented incidents of death or insanity among humans who had ingested peyote. The plant is properly described as a 'hallucinogen' and is not a narcotic or habit forming substance." (emphasis added)

The State presented the testimony of Dr. Maurice Seevers, a professor and chairman of the Department of Pharmacology at the University of Michigan, who gave his opinion regarding the deleterious effects of peyote. Dr. Seevers' testimony was based exclusively on unpublished research undertaken approximately sixteen years before trial in which dogs were given dosages of peyote in order to determine what a lethal amount of the substance would be. Monkeys were given peyote to determine what amounts were absorbed and to analyze the blood levels obtained from the ingested substance. Evidence was elicited which substantiated the court's findings that many of the dogs convulsed and ultimately died. There were no experiments performed on humans. Dr. Seevers stated that a dog is able to tolerate a dose of peyote approximately 100 times greater than would be tolerable for humans. This "rule of thumb" which Dr. Seevers quoted is a well established pharmacological and toxicological extrapolition factor.

The record presented to this Court, however,

is devoid of any evidence of death or convulsions in humans. This is not to say that Dr. Seevers' testimony was incorrect or could not ultimately be proved to be correct with reference to the effects of peyote on humans. In essence, the testimony does substantiate the State's contention that the excessive use of peyote might be attended by certain ill effects or damage to humans. However, we take judicial notice of the fact that many products are marketed universally and yet if ingested in unusually large amounts can be harmful, to wit, aspirin and alcohol. The uncontroverted evidence on the record was that peyote is not a narcotic substance and is not habit-forming. The fact that the use of peyote will not result in addiction is crucial because the State would have a great interest in protecting its citizens from drug abuse. Had the addictive qualities of peyote been proven, the State's interest would be stronger because of the possible burden upon our resources that an addict can become if the State is forced to assume the maintenance of this individual. Furthermore, the State failed to prove that the quantities of peyote used in the sacraments of the Native American Church are sufficiently harmful to the health and welfare of the participants so as to permit a legitimate intrusion under the State's police power.

The next issue to be resolved is whether there is a compelling State interest in the regulation of peyote, given the facts that the free exercise of the religion would be curtailed and that a substantial threat in the sacramental use of peyote has not been proven. We recognize that the United States Supreme Court has stated:

"In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite that (sic) the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. . ." WEST VA. BOARD OF EDUCATION v. BARNETTE, supra, 319 U.S. at 639.

We have also been guided by the California Supreme Court's decision in PEOPLE v. WOODY,

40 Cal. Rptr. 69, 394 P.2d 813 (1964), in reaching the legal conclusion that the First Amendment right of freedom of religion clothes these defendants with immunity from prosecution. That case is startlingly similar to the instant one on the facts, in which the State of California had interests similar to those now argued by The Attorney General. The court there reached a legal conclusion identical to the one this Court has reached.

Regarding the State's contention that enforcement would be difficult, and abuse due to fraudulent claims of religious sincerity would reign, we can only reiterate that the record before this Court does not give us pause to doubt the appellants' sincerity.

The California court in WOODY was presented with a similar argument, and held that the determination must be made upon a case-to-case basis:

> " . . . We do not doubt the capacity of judge and jury to distinguish between those who would feign faith in an esoteric religion and those who would honestly follow it. 'Suffice it to say that trial courts will have to determine in each instance, with whatever evidence is at hand, whether or not the assertion of a belief which is protected by the First Amendment is in fact a spurious claim.' (In re Jenison, supra, 125 N.W. 2d 588, 590; italics added.) Thus the court makes a factual examination of the bona fides of the belief and does not

> intrude into the religious issue at all; it does not determine the nature of the belief but the nature of the defendants' adherence to it." (emphasis added) 394 P.2d at 813

The holding in the instant case is based upon what can be considered a rather complete record in which the trial court determined, and we feel correctly so, that the defendants were sincere participants in what appeared to be a meeting of the Native American Church.

Therefore, in a prosecution for an alleged violation of A.R.S. § 36-1061 it is a defense to that prosecution to show that the peyote was being used in connection with a bona fide practice of a religious belief; that it was an integral part of the religious exercise; and that it was used in a manner not dangerous to the public health, safety or morals. See In re GRADY, 39 Cal. Rptr. 912, 394 P.2d 728 (1964)

Where sincere participants ingest peyote while taking part in a bona fide religious ceremony, and (as was said by the court in WOODY) "the use of peyote incorporates the essence of the religious expression", there is a clear exception from the purview of A.R.S. § 36-1061. The State of Arizona's interest cannot be of such a different quality or nature than those jurisdictions that have acknowledged an exception within their criminal codes for the sacramental use of peyote in a bona fide religious ceremony.

To conclude, in WOODY it was stated:

"We know that some will urge that it is more important to subserve the rigorous enforcement of the narcotic laws than to carve out of them an exception for a few believers in a strange faith. They will say that the exception may produce problems of enforcement and that the dictate of the state must overcome the beliefs of a minority of Indians. But the problems of enforcement here do not inherently differ from those of other situations which call for the detection of fraud. On the other hand, the right to free religious expression embodies a precious heritage of our history. In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. ..." 394 P.2d 813

For the aforementioned reasons the judgments of conviction are set aside.

Reversed.

s/ Francis J. Donofrio
FRANCIS J. DONOFRIO,
Presiding Judge, Department A

CONCURRING:

s/ Henry S. Stevens
HENRY S. STEVENS, Judge

s/ L. R. Haire
LEVI RAY HAIRE, Judge

APPENDIX D

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	
	)	
Appellee,	)	NO. 1CA-CR 443
	)	
vs.	)	DEPARTMENT A
	)	COCONINO County
JANICE WHITTINGHAM and	)	Superior Court
GREG WHITTINGHAM,	)	Cause No. CR-5650
	)	
Appellants.	)	MOTION FOR
	)	REHEARING

COMES NOW the appellee, State of Arizona, by and through The Attorney General, Gary K. Nelson, and Assistant Attorneys General, James R. Redpath and Rod McDougall, and pursuant to 17 A.R.S., Rules of the Supreme Court, Rule 47(a), moves the court for a rehearing based upon the following grounds:

1. This court has substituted its findings of fact for those found by the trial court below;

2. The court has hereby established and given preference to a particular religion in violation of the Constitution of the United States and the State of Arizona;

3. The court has made an arbitrary classification in violation of the Constitution of the United States and the State of Arizona.

DATED THIS 24th day of January, 1973.

GARY K. NELSON
The Attorney General

By s/James R. Redpath
JAMES R. REDPATH

By s/Rod McDougall
ROD MC DOUGALL

Assistant Attorneys General
Attorneys for Appellee
State of Arizona

MEMORANDUM

17 A.R.S., Rules of the Supreme Court, Rule 47(a) provides:

> "Any party desiring a rehearing from a decision or an order finally disposing of any case in the Court of Appeals, except an order denying a motion for rehearing, may, within fifteen days after the clerk has given notice that a decision or final order has been rendered by the Court of Appeals, file therein a Motion in writing for a rehearing, specifying the particular grounds for rehearing. A copy of the Motion shall be served upon the adverse party or his attorney. A Motion for Rehearing shall not be amended except by leave of Court."

On May 24, 1971, the Superior Court of Coconino County, the Honorable J. Thomas Brooks presiding, rendered its opinion and judgment in this matter. A copy of that opinion is attached hereto and made a part hereof as Exhibit A. That opinion, quoted extensively by this court, contained many findings of fact and finally a conclusion of law. There had been no specific request for those findings of fact.

The most significant finding of fact made by the trial court was, in the words of Judge Brooks on page 5 of his opinion:

> "By reason of the distortions of perception caused by the ingestion of peyote, together with the other possible psychological and physiological results described earlier in this memorandum, the substance is subject to abuse and could conceivably result in a person being dangerous to himself or to the person or property of others. There is enough of a danger in peyote to qualify as a compelling interest of the State in upholding a valid statute prohibiting its possession.
>
> * * *
>
> "The possibility of misuse or abuse of peyote is somewhat graphically illustrated by testimony that during the ceremony at Parks,

> Arizona, certain members of the congretation [sic] were observed placing handfuls of peyote capsules in their pockets."

The record was uncontroverted that peyote was a potentially dangerous substance. Appellants at trial offered absolutely no controverting evidence that this was not so. Further, appellants' own testimony confirmed the fact that the substance is subject to abuse, as evidenced by the fact that they had had trouble before and even in this alleged "religious meeting" people were stuffing their pockets full of the peyote capsules. Appellants' own expert, Dr. Stewart, testified that he had allowed the use of peyote in his home not in conjunction with any religious service. The peyote was furnished to some students who were idly curious. (TR Vol. IV, p. 647). As will be hereinafter argued, appellee contends that this court is bound by the trial court's findings of fact and should, therefore, affirm the lower court's judgment.

This court makes the statement on page 6 of its opinion that:

> "The record presented to this Court, however, is devoid of any evidence of death or convulsions in humans. ..."

This simply is not the status of the record. Not only did appellants' expert, Dr. Stewart, testify to reports of death, but Dr. Seevers did as well. See TR Vol. IV, pp 603 and 604 where Dr. Stewart in response to a question put to him by

appellants' own counsel said:

> "Q Doctor, are there any reports of, say death or insanity attributed to peyote?
>
> * * *
>
> "THE WITNESS: Yes."

And at TR Vol. IV, p 674, 11. 16 - 19:

> "Q I believe in response to one of Mr. Mangum's questions you stated you had heard of reports where peyote had caused death or insanity.
>
> "A Yes."

Dr. Seevers testified in TR Vol. VI, p 902, 11. 9-16:

> "Q Do you know of any cases that you have been able to track down of anyone dying during a church service in the Native American Church?
>
> "A I haven't attempted to track any down and I do not know of any, although I have heard by hearsay that they have occurred. ..."

The record was not, therefore, devoid of

any evidence of death resulting from peyote. True, in later testimony Dr. Stewart did explain that the physician who signed the death certificate did not attribute the deaths to peyote, but some of his Indian informants believed the cause to be peyote. Again this evidence was uncontradicted.

This court then finds, "In essence, the testimony does substantiate the State's contention that the excessive use of peyote might be attended by certain ill effects or damage to humans." Based upon this finding by this court, it is submitted that the appellee's overriding and compelling interest is thus established and the lower court's judgment should be affirmed.

This court then states that the crucial element lacking and not proved by the state was that peyote was not addictive. It is submitted that whether or not peyote is addictive should have no bearing on the matter whatsoever. This court could take judicial notice that marijuana or LSD is not addictive. Yet our Legislature has, as they did here, found these two substances to be dangerous or potentially dangerous to the public safety, health and welfare of the people of the state. The criteria for control is not whether a substance is addictive but whether it is or potentially is harmful and is subject to abuse. These two questions have been answered in the affirmative by the court below.

This court has also placed great emphasis on the decision in People v. Woody, 40 Cal. Rptr. 69, 394 P.2d 813(1964). That decision is easily distinguishable from the instant situation. There never was a challenge as to whether the ceremony was a

bona fide ceremony of the Native American Church. There, too, all participants were Indians and it was conceded they were members of the Native American Church. Here there was such a challenge. It was never established nor found that this service was one of the Native American Church. All of the testimony and evidence presented was directed to the Native American Church. Any exemptions or exceptions to any laws of any states or of the United States have been directed to the Native American Church.

This court has by its decision here seemingly broadened that exemption. This court has said on page 8:

> "Therefore, in a prosecution for an alleged violation of A.R.S. § 36-1061 it is a defense to that prosecution to show that the peyote was being used in connection with a bona fide practice of a religious belief; that it was an integral part of the religious exercise; and that it was used in a manner not dangerous to the public health, safety or morals." (Emphasis added)

Anyone simply expressing a belief as opposed to showing establishment of a bona fide membership in an "established religion" is thereby exempt. Taking it one step further, marijuana or LSD could be exempt by the expression of a belief since appellee could not show an overriding and compelling interest as they are not addictive.

This court has said that appellants were participants in a meeting of the Native American Church. The court below did not so hold. The court there found only that, at page 4:

> ". . . the Defendants Whittingham were serious and sincere participants in what they considered to be a ceremony having religious significance, . . ."

In a recent decision from the Ninth Circuit, Kennedy v. Bureau of Narcotics and Dangerous Drugs, 459 F.2d 415 (1972) the court was faced with the problem of another religious group seeking the same exemption enjoyed by the Native American Church under the federal regulstins(sic). The court in addressing itself generally to the exemption said at page 417:

> " . . . It follows that the exemption regulation creates an arbitrary classification that cannot withstand substantive due process attack."

A petition for a writ of certiorari was recently denied by the Supreme Court on January 8, 1973. Therefore, if this court's opinion is limited solely to the Native American Church, it would suffer the same constitutional infirmities described above.

It is axiomatic that a presumption exists in favor of supporting the lower court's judgment. It is also axiomatic that on appeal the appellant

court may not substitute its findings of fact for those of the trial court. See Lawrence v. Valley National Bank, 12 Ariz. App. 51, 467 P.2d 763 (1970) at page 57:

> ". . . In matters of factual dispute, we defer to the trial court. All inferences supported by the evidence will be taken in favor of appellee. (Citation omitted)
>
> "The judgment of the superior court is presumed correct if there is reasonable evidence in the record to sustain it and the reviewing court will not substitute its own discretion for that exercised by the court below. (Citation omitted)
>
> "The reviewing court must affirm the judgment if possible on any theory framed by the pleadings and supported by the evidence." (Citation omitted)

See also Fleming v. Becker, 14 Ariz. App. 347, 483 P.2d 579 (1971) at page 582 where Judge Donofrio said:

> "The trial judge made no express findings of fact and conclusions of law; no request therefor having been made. (Citation omitted) When no such request is made, this Court must assume that the trial court found every controverted issue of fact necessary

> to sustain the judgment and, if there is reasonable evidence to support such finding, sustain the judgment. (Citation omitted)
>
> "In examining the record herein it is imperative that we first determine whether there was evidence to support the appellee's position that there was no loan."

And as to whether the appellate court may substitute its findings of fact for those of the lower court see In Re Adoption of Baby Boy, 106 Ariz. 195, 472 P.2d 64 (1970) at page 202:

> "Where the evidence is in conflict, the Supreme Court will not substitute its own opinion for that of the trial court. Evidence will be taken in the strongest manner in favor of the findings of the trial court. (Citation omitted) The fact that this Court might have taken a contrary view of the facts in a case does not authorize a reversal of a judgment. ..." (Citation omitted)

Or as this court said in Marquess v. Spaner, 15 Ariz. 342, 488 P.2d 698 (1971) at page 344:

> ". . . On review we are required to accept the findings of fact as true unless they are clearly erroneous or unsupported by any

> credible evidence. . . ."(Citation omitted)

Not only must the express findings of the trial court be accepted, but as was said in Mong Ming Club v. Tang, 77 Ariz. 63, 266 P.2d 1091 (1954) at page 67:

> ". . . On appeal, we as a reviewing court, must assume that the trial court found, in addition to express findings of fact appearing in the record, such additional facts as are necessary to sustain the judgment, if they are reasonably supported by the evidence, and not in conflict with the express findings. ..." (Citations omitted)

In effect this court has substituted its findings of fact for that of the court below. On page 5 of the opinion this court has said:

> "The Court must next determine whether there is a substantial threat to public safety, order or peace resulting from the use of peyote. ..."

The court below found that it was a substantial threat to the public health, safety and welfare and that it was a drug subject to abuse. As heretofore pointed out, this court may not now substitute its facts for those of the trial court and thus find that peyote is not dangerous and is not subject to abuse.

It seems the crux of the court's decision is that peyote is not habit forming, such as heroin, and, therefore, a person would not become a ward of the state and therefore a monetary burden. Protection of the public health, safety or welfare of the people of the State of Arizona under the police power has never been and should not now be limited to whether or not an economic burden is involved. If, as here, the drug is dangerous and is subject to abuse, then the state does have an overriding and compelling interest for the protection of the health, safety and welfare of the people of this state.

This court has now said that belief is the principle criteria in establishing a religious defense. How does one challenge belief? A simple statement of belief, such as was done here, would apparently establish the requisite belief and thus grant an exception to a prosecution.

Does this court, by this opinion, mean to say, that anyone using a drug, such as marijuana or LSD in connection with a bona fide practice of a religious belief is exempt from criminal prosecution? Appellee hopes this is not the court's intent. However, as the opinion clearly indicates, this would be and is the inescapable result.

It is respectfully submitted that this court should review its decision in light of the reasons heretofore cited and affirm the judgment and opinion reached by the trial court below.

Dated this 24th day of January, 1973.

GARY K. NELSON
The Attorney General

By s/James R. Redpath
JAMES R. REDPATH

Bys/Rod McDougall
ROD MC DOUGALL
Assistant Attorneys General
Attorneys for Appellee
State of Arizona

Copy of the foregoing mailed this
24th day of January, 1973, to:

RICHARD K. MANGUM
Mangum, Wall & Stoops
P. O. Box 10
Flagstaff, Arizona 86001
Attorneys for Appellants

s/ James R. Redpath

JAMES R. REDPATH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

27 February 1973	)	
	)	
STATE OF ARIZONA,	)	1 CA-CR 443
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	Coconino County
	)	Superior Court
JANICE WHITTINGHAM and GREG WHITTINGHAM,	)	No. CR-5650
	)	
	)	O-R-D-E-R
Appellants.	)	
	)	

The motion for rehearing and the response thereto have been considered by Judges Donofrio, Stevens and Haire.

IT IS ORDERED denying the motion for rehearing.

s/ Francis J. Donofrio
FRANCIS J. DONOFRIO
Presiding Judge

A true copy of the foregoing order was mailed this 27th day of February, 1973, to:

Mr. James R. Redpath
Mr. Roderick G. McDougall

Assistant Attorneys General
Arizona Highway Department
Legal Division
206 South 17th Avenue
Phoenix, Arizona 85007
Attorneys for Appellee

Mr. Richard K. Mangum
Mangum Wall & Stoops
Post Office Box 10
Flagstaff, Arizona 86001
Attorneys for Appellants

CLASSIE GANTT, Clerk
By
s/Dorothy Denman
Deputy Clerk

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	
	)	
Appellee,	)	1 CA-CIV 1259(sic)
	)	
vs.	)	DEPARTMENT A
	)	
JANICE WHITTINGHAM and GREG WHITTINGHAM,	)	PETITION FOR REVIEW
	)	
Appellants.	)	
	)	

COMES NOW Appellee, STATE OF ARIZONA, in the above entitled Court, and pursuant to Supreme Court Rule 47(b), do state that their motion for rehearing was denied by order dated the 27th day of February, 1973, and that Appellee hereby files a petition for review by the Arizona Supreme Court.

DATED this 6th day of March, 1973.

GARY K. NELSON
The Attorney General

By s/James R. Redpath
JAMES R. REDPATH

By s/Rod McDougall
ROD MC DOUGALL
Assistant Attorneys General
Attorneys for Appellee

COPY of the foregoing mailed this
6th day of March, 1973, to:

Mr. Richard K. Mangum
Mangum Wall & Stoops
Post Office Box 10
Flagstaff, Arizona 86001
Attorneys for Appellants

s/James R. Redpath
JAMES R. REDPATH

SUPREME COURT
STATE OF ARIZONA
PHOENIX
85007

April 4, 1973

STATE OF ARIZONA,	)	Supreme Court
	)	No. 2680-PR
Appellee,	)	
	)	Court of Appeals
v.	)	No. 1 CA-CR 443
	)	
JANICE WHITTINGHAM and	)	Coconino County
GREG WHITTINGHAM,	)	No. CR 5650
	)	
Appellants.	)	
	)	

The following action was taken by the Supreme Court of the State of Arizona on April 3, 1973 in regard to the above entitled cause:

"ORDERED: Petition for Review = GRANTED."

The Court of Appeals, Division One, is requested to forward the remaining sets of briefs, if available.

CLIFFORD H. WARD, Clerk

By Mary Ann Hopkins
Deputy Clerk

TO: Hon. Gary K. Nelson, Attorney General,
159 State Capitol, Phoenix 85007
Attention: James R. Redpath and Rod McDougall
Richard K. Mangum, Esq. Mangum, Wall & Stoops, P. O. Box 10, Flagstaff 86001
J. Michael Flournoy, Coconino County Attorney Courthouse, Flagstaff 86001
Clerk, Court of Appeals, Division One, State Capitol Bldg., Phoenix 85007
West Publishing Company, 50 Kellogg Blvd., St. Paul, Minnesota 55102
Hon. Laurance T. Wren, Presiding Judge of Coconino County Superior Court, Courthouse, Flagstaff 86001

SUPREME COURT
STATE OF ARIZONA
PHOENIX
85007

January 23, 1974

STATE OF ARIZONA,	)	Supreme Court
	)	No. 2680-PR
Appellee,	)	
	)	Court of Appeals
vs.	)	No. 1 CA-CR 443
	)	
JANICE WHITTINGHAM and	)	Coconino County
GREG WHITTINGHAM,	)	No. CR 5650
	)	
Appellants.	)	
	)	

The following action was taken by the Supreme Court of the State of Arizona on January 22, 1974 in regard to the above-entitled cause:

"ORDERED: Vacating the Order heretofore entered granting Petition for Review.

FURTHER ORDERED: Denying said Petition Review."

Record returned to the Court of Appeals, Division One, this 22nd day of January, 1974.

CLIFFORD H. WARD, Clerk

By s/Mary Ann Dixon
Deputy Clerk

TO: Hon. Gary K. Nelson, AttorneyGeneral
159 State Capitol, Phoenix, Arizona 85007
Richard K. Mangum, Esq., Mangum, Wall & Stoops, Post Office Box 10, Flagstaff, Arizona 86001
J. Michael Flournoy, Coconino County Attorney, Courthouse, Flagstaff, Arizona 86001
Clerk, Court of Appeals, Div. One, 309 Capitol, Phoenix, Arizona 85007
West Publishing Company, 50 Kellogg Blvd., St. Paul, Minnesota 55102
Hon Laurance T. Wren, Presiding Judge, Coconino County Superior Court, Courthouse, Flagstaff, Arizona 86001

pkg

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	
	)	
Appellee,	)	1 CA-CR 443
	)	DEPARTMENT A
v.	)	
	)	COCONINO County
JANICE WHITTINGHAM and	)	Superior Court
GREG WHITTINGHAM,	)	No. CR-5650
	)	
Appellants.	)	
	)	

O-R-D-E-R and M-A-N-D-A-T-E

Gary K. Nelson, The Attorney General Phoenix
By James R. Redpath and
Roderick G. McDougall
Assistants Attorney General
Attorneys for Appellee

Mangum, Wall & Stoops
By Richard K. Mangum
Attorneys for Appellants

The opinion of this Court in the above matter was filed on the 9th day of January, 1973.

A petition for review was filed. The record was forwarded to the Arizona Supreme Court. By order dated the 3rd day of April, 1973, the Arizona

Supreme Court granted the petition for review, Supreme Court No. 2680-PR.

Thereafter, on the 22nd day of January, 1974, the following action was taken by the Arizona Supreme Court:

"ORDERED: Vacating the Order heretofore entered granting Petition for Review.

FURTHER ORDERED: Denying said Petition for Review."

IT IS ORDERED judgment and sentence reversed.

IT IS FURTHER ORDERED that a certified copy of this order together with a copy of the opinion be forwarded to the Clerk of the Superior Court for COCONINO County; that a copy of this order be sent to the above-named parties or their attorneys of record, and to THE HONORABLE J. THOMAS BROOKS, Judge on Appeal, and THE HONORABLE LAURANCE T. WREN, Presiding Judge, as well as to the COCONINO County Attorney.

IT IS FURTHER ORDERED, pursuant to this Court's order of the 11th day of March, 1965, that the Clerk of this Court return to the Clerk of the Superior Court all records, exhibits and other matters received from said Clerk by this Court in aid of the consideration of this matter.

DATED this 20th day of March, 1974.

s/ Francis J. Donofrio
Presiding Judge, Department A

APPENDIX E

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCONINO

THE STATE OF ARIZONA, Plaintiff,	)	No. 5650
vs.	)	PLAINTIFF'S POST-TRIAL MEMORANDUM
JANICE WHITTINGHAM, et al., Defendants.	)	

COMES NOW the plaintiff by and through William A. Flick, Chief Deputy County Attorney, Coconino County, and submits its Post-Trial Memorandum as follows:

ARIZONA REVISED STATUTES, SECTION 36-1061 SHOULD BE UPHELD AND THE DEFENDANTS CONVICTED FOR A VIOLATION THEREOF NOTWITHSTANDING THE DEFENSE PRESENTED AT THE TRIAL.

A. Constitutional Background

The First Amendment of the Federal Constitution states in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . ." This amendment was early interpreted by the United

States Supreme Court to not grant religious groups carte blanche freedom to engage in any activity they desired. In denying the Mormon religion first amendment protection to practice polygamy the Court in Reynolds v. United States, 98 U.S. 145 (1878), distinguished between religious beliefs and practices:

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent sacrifice.

Id. at 166. See also Cleveland v. United States, 329 U.S. 13 (1946); Davis v. Beason, 133 U.S. 333 (1890). This distinction was further recognized and affirmed by the Court in Cantwell v. Connecticut, 310 U.S. 196 (1940); a case involving the constitutionality of a statute forbidding religious solicitation. In declaring the statute unconstitutional, the Court said: "Thus, the (First) Amendment embraces two concepts, -- freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." Id. at 303-04. The freedom of belief and freedom of action distinction has also been recognized by state courts. See, e.g., Hill v. State, 88 So.2d 880 (Ala. Ct. App. 1956) (defendant convicted of dangerously handling snakes although such activity was a part of his religion).

B. Compelling State Interest

Certain religious practices which interfere with the state's interest have nevertheless been allowed by the courts. In the case of In re Jenison, 120 N.W.2d 515 (Sup.Ct. Minn. 1963), rev'd per curiam and remanded, 375 U.S. 14, the defendant was not guilty of contempt for refusing to serve on a jury because of her religious belief against judging others. Similarly, in the case of Sherbert v. Verner, 374 U.S. 398 (1962), a Seventh Day Adventist was granted unemployment compensation when she was fired because she would not work on Saturday and could not obtain other employment. The court in People v. Woody, 40 Cal. Rptr. 69, 394 P.2d 813 (1964) apparently extracted the principle from these cases "that a religious practice or ritual must be first examined to determine whether it presents a danger to the society which the state has a compelling interest in preventing." Weiss & Wizner, Pot, Prayer, Politics and Privacy: The Right to Cut Your Own Throat in Your Own Way, 54 IOWA L. REV. 709, 715 (1969). Whether the instant matter constitutes religious activity, which the state has a compelling interest in controlling, should be determined by analyzing Woody and the other similar cases which set the standard for a compelling interest.

Woody involved the arrest and conviction of Indian members of the Native American Church for the use of peyote. The convictions were reversed by the Supreme Court of California which said:

> We have concluded that since the defendants used the peyote in a bona fide pursuit of a religious faith, and since the practice does not frustrate

> a compelling interest of the state, the application of the statute improperly defeated the immunity of the First Amendment of the Constitution of the United States.

People v. Woody, supra at 394 P.2d 815. It should be noted that in addition to the above mentioned compelling state interest test the idea of a bona fide religious activity seemed to be important to the court's decision. The court concluded that the state's interest was outweighed by the Indian's religious activity and that there was only a slight danger to the state and to the enforcement of its laws. One important fact, if it may be inserted at this juncture, distinguishing the instant matter from Woody, is that in Woody, only Indian members of the Native American Church were using the peyote. Since the number of these Indians is relatively small, danger to the state may not be "compelling" when peyote is used only by Indians, especially in the State of Arizona where the vast majority of Indians live on the reservations and not within the jurisdiction of the state. The instant matter, however, differs from Woody in that many Anglos were also using the peyote; in fact a majority of those present were young Anglos. Thus, although there may not be a compelling state interest when only Indians who are members of the Native American Church ingest peyote, the potential dangers become more apparent when such a practice is available to larger groups.

Harmful effects produced by peyote are somewhat difficult to categorize as there seems to be a divergence of opinion as to peyote's harmful nature. One law review commentator concludes that "the preponderance of the evidence supports the Woody

court's conclusion; the physical effects of the drug are so minimal that there appears to be no reasonable basis for a health regulation". 17 STAN. L. REV. 495, 497 (1965). It is similarly argued that peyote is not physically addicting and "It would appear that taken in moderate doses the hallucinogens are not demonstrably harmful to physical health." Laughlin, LSD-25 and the Other Hallucinogens: A Pre-Reform Proposal, 36 GEO. WASH. L. REV. 23, 25 (1967). A student article concludes that:

> Wherever the state can make a colorable claim that its regulation gives significant protection to the health or safety of its citizens, a defense based on the free exercise clause will fall. And there is surely enough evidence that hallucinogens do harm to uphold prohibition under this theory.

Note, Hallucinogens, 68 COLUM. L. REV. 521, 551 (1968). Furthermore,

> It has been claimed, in support of legislation prohibiting the possession or use of marijuana and other psychedelic drugs, that they lead to some or all of the following: (1) violent crimes; (2) sex offenses; (3) genetic defects; (4) bizarre behavior; (5) suicides; (6) psychoses; (7) "deterioration" (mental or physical); (8) addiction or "preaddiction" (physiological or psychological); (9) "vagabondage" (indolence, sloth); (10) social dependency; (11) quietism; or that (12) such use is widely regarded as immoral.

Finer, Free Exercise, Compelling Governmental Interests and Psychedelic Drugs: The Meaning and Scope of Religious Freedom, 19 HASTINGS L.J. 701, 719-20 (1968) (the author tries to rebutt each of these contentions). Although these claims are probably not all valid, the President's Commission on Law Enforcement and Administration of Justice, Narcotics and Drug Abuse (Task Force Report 1967) did state several facts: (1) "There is no reliable statistical information on the prevalence of dangerous drug abuse. However, there are indications of widespread and increasing abuse." Id. at 5. (2) "The simple truth is that the extent of the addict's or drug user's responsibility for all nondrug offenses is unknown." Id. at 11. (3) "The use of other hallucinogens, peyote for example (LaBarre, 1938) has been fairly well confined to tradition (Indian) groups, but their use, too, is expanding to young urban people." Id. at 27. (4) "Mescaline psychoses are also verified." Id. (5) "With regard to vehicle accidents and hallucinogens, there have been no studies and no verified reports in spite of some remarkable 'I was there' accounts. Experimental work showing slowed responses and reduced information processing make it highly likely that accidents will occur under hallucinogen influence." Id. at 28.

Also, in denying a petition to the Church of the Awakening for federal permission to use peyote, the hearing officer for the Bureau of Narcotics and Dangerous Drugs of the Department of Justice concluded:

> The Government has direct responsibility and interest in the control of certain hallucinogenic drugs under the Drug Abuse Control Amendments of 1965.

Peyote has been designated as a drug with a potential for abuse because of its hallucinogenic effect and it is subject to control under the Amendments.

This law was passed by the Congress to improve Federal control over depressant, stimulant, and hallucinogenic drugs because their illegal manufacture or diversion into illicit market posed a danger to the public health and safety. The Government's interest for the public welfare is sufficient to override the inconvenience that refusal of the exemption might cause to the petitioners.

Peyote is an inherently dangerous substance capable of producing psychosis and other psychological harm as well as physical problems. There is insufficient knowledge in the areas of medicine and science to permit the promiscuous unleashing of this drug without adequate medical or psychiatric supervision. . . To administer this drug and other hallucinogens requires careful procedures. A physician is essential to the experience. Likewise, screening of the prospective user must be done by one capable of diagnosing certain psychological and medical factors which preclude the use of nonmedical personnel proposed by the Church.

35 Fed. Reg. 2877 (Feb. 12, 1970).

Several cases demonstrate that a valid statute, such as Arizona Revised Statutes sections 32-1964(a)(7), 32-1965 and 32-1975 (possession and transfer of mescaline which is contained in peyote, a felony) and section 36-1061 (possession of peyote, a misdemeanor), has been upheld against hallucinogenic drug users because of a compelling state interest. For example, the court in State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966) denied a member of the Neo-American Church the freedom to use marijuana and peyote in connection with his religion. The court said:

> The defendant may believe what he will as to peyote and marijuana and he may conceive that one is necessary and the other is advisable in connection with his religion. But it is not a violation of his constitutional rights to forbid him, in the guise of his religion, to possess a drug which will produce hallucinotory symptoms similar to those produced in cases of schizophrenia, dementia, praecox, or paranoia, and his position cannot be sustained here--in law nor in morals.

148 S.E.2d at 569. Likewise, in State v. Big Sheep, 243 P. 1067 (Mont. 1926), the court found an Indian member of the Native American Church guilty of having possession of peyote violative of a Montana statute. The court concluded that "it was clearly within the power of the legislature to determine whether the practice of using peyote is inconsistent with the good order, peace, and safety of the state." 243 P. at 1073. In People v. Mitchell, 52 Cal. Rptr. 884 (Cal. Ct. App. 1966) the defendant was found guilty of possession of marijuana even though

he considered the smoking of marijuana a religion. Part of the court's retionale (sic) for the decision stemmed from the fact that in Woody evidence indicated a restricted use of peyote -- only by Indians in their religious ceremonies -- while there was no such showing in Mitchell. Id. at 888. Similarly, marijuana laws were upheld in Colorado when the court in People v. Stark, 400 P.2d 923 (Colo. 1965) stated:

> Clearly, the use of marijuana and other drugs identified in the Colorado statute presents a danger to the public safety and welfare of the community since they are clearly related to each other and the commission of crime.

Id. at 927.

It can be concluded, therefore, that although the precise harmful effects of peyote are not presently known, there is enough of a danger in peyote to qualify as a compelling interest of the state in upholding a valid statute prohibiting its possession. Further, that defendants' conduct in the matter constitutes activity beyond the protection of the First Amendment.

C. Equal Protection of the Laws

There is absolutely no discriminatory treatment or application of the statute involved (A.R.S. Section 36-1061). Simply stated it is illegal to possess or sell peyote by anyone in the State of Arizona, and this statute is applied equally to everyone.

If as defendants assert an exception to this statute should be made, then it would seem that they would run afoul of the very constitutional amendments they now assert. See Board of Ed. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968) at page 242:

> . . . the Establishment Clause bars a State from passing 'laws which aid one religion, aid all religions, or prefer one religion over another,'
> . . .

The statement by the Court in Reynolds v. United States, 98 U.S. 163, 8 Otto 163, 25 L.Ed. 244 (1878) at pages 166 and 167 is certainly appropriate in the present situation:

> . . . those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice.

> So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? *To permit this would be to make the (*167 professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

While the court was there speaking of polygamous marriages the same reasoning would apply to peyote and mescaline.

In the recent decision of United States v. Kuch, D.C.D.C. 288 F. Supp. 439 (1968) the court addressed the problem of religious freedom as provided in the Constitution and its relationship to criminal statutes at page 445:

> The Constitution protects the right to have and to express beliefs. It does not blindly afford the same absolute protection to acts done in the name of or under the impetus of religion. . .

While there was a grave question as to the authenticity of the alleged religion the Court went on to say:

> The practices of the Neo-American Church involving the use, possession, transfer and sale of marijuana and LSD are contrary to the criminal law.

> Starting with an acceptance of Kuch's religious claim, it is necessary to determine whether the legislation under which defendant stands indicted unduly infringes her freedom to practice what she asserts are religious beliefs. . .

There the defendant claimed that these statutes as is claimed here unduly infringed on her religious freedom. The Court said:

> Defendant misconceives the Constitution and the decisions when she claims in effect an unbridled right to practice her beliefs. The public interest is paramount and if properly determined the Congress may inhibit or prevent acts as opposed to beliefs even where those acts are in accord with religious convictions or beliefs. If individual religious conviction permits one to act contrary to civic duty, public health and the criminal laws of the land, then the right to be let alone in one's belief with all the spiritual peace it guarantees would be destroyed in the resulting break-down of society. . .

Defendants also claim that if there is any harm by reason of the ingestion of peyote it is minimal. But as was said in Leary v. United States, C.A. Tex. 383 F.2d 851 reh. den. 392 F.2d 220, cert. den. 392 U.S. 903, 88 S.Ct. 2058, 20 L.Ed 1362 (1967) at pages 860 and 861:

> Congress has made it a crime to traffic in marijuana and it was not incumbent upon the Government to produce evidence to controvert the testimony of witnesses on the controversial question whether use of the drug is relatively harmless. . .

This reasoning applies in the instant case. The legislature by enacting the statutes, as heretofore cited, has demonstrated its feeling that the possession and use of peyote is a threat to public safety, peace and order and a serious threat to its people. As the Court stated:

> . . . It would be difficult to imagine the harm which would result if the criminal statutes against marihuana were nullified as to those who claim the right to possess and traffic in this drug for religious purposes. For all practical purposes the anti-marihuana laws would be meaningless, and enforcement impossible. The danger is too great, especially to the youth of the nation, at a time when psychedelic experience, 'turn on', is the 'in' thing to so many, for this court to yield to the argument that the use of marihuana for so-called religious purposes should be permitted under the Free Exercise Clause. We will not, therefore, subscribe to the dangerous doctrine that the free exercise of religion accords an unlimited freedom to violate the laws of the land relative to marihuana.

Defendants have cited a number of states which have enacted permissive legislation with regard to the Native American Church. Defendants' list does not cover as the court can readily ascertain all 50 states. Not even a large minority is listed. It is interesting to note, that while Montana has legislatively repealed their anti-peyote statutes their court said as pointed out in Leary, supra, at page 861:

> In the early case of State v. Big Sheep, 75 Mont. 219, 243 P. 1067 (1926), the Montana Supreme Court held, 'It was clearly within the power of the Legislature to determine whether the practice of using peyote is inconsistent with the good order, peace and safety of the state,' against the contention that the defendant's religious freedom was infringed.

And as shown in Leary, supra, the North Carolina Court was not receptive to the religious freedom argument at pages 861 and 862, (heretofore cited).

These cases were cited in response to defendants' argument there that the California Court in Woody had accepted the religious freedom argument.

D. Non Bona Fide Religious Ceremony

The second important concept relied upon by the Woody court mentioned briefly above -- the bona fides of the religious activity -- is crucial in the instant matter. A companion case to Woody, In re Grady, 39 Cal. Rptr. 912, 394 P.2d 728 (1964), involved a non-Indian "peyote preacher." The court in Grady concluded that:

> Unlike the situation in Woody, however, the defendant here has not proved that his asserted belief was an honest and bona fide one. A factual question remains as to whether defendant actually engaged in good faith in the practice of a religion.

Id. at 729. It is asserted that the persons involved in the instant matter were not conducting a bona fide religious ceremony of the Native American Church. The reasons leading to this conclusion are: (1) Some participants in the ceremony gave money in order to enter the ceremony. The custom of the Native American Church is to obtain offerings after the ceremony has ended. (2) The ceremony was sponsored by Anglos, also contrary to established church practice. (3) The purpose of the ceremony was to marry two Anglos, which has nothing to do with the purposes of the Native American Church because Anglos cannot become members nor should they attend and partake of the peyote sacrament. (4) The shape of the altar was not according to church usage -- it was of a rectangular shape when it should have been crescent. Likewise the fire, another important part of the ceremony, had no significance because it was built by the narcotics agents in metal drums contrary to the established ritual of the church. (5) The sacrament was contained in capsules, which also is not according to church usage. (6) Finally, the ceremony was open to the public when it should have been restricted to members of the Native American Church. Therefore, although some or all of the Indians who were present in the instant situation may be members of the Native American Church, the particular ceremony at which they were apprehended had enough irregularities to mark it as something not sponsored by the church -- not a bona fide religious ceremony, rather one where an

unrestricted and untested number of Anglos were allowed to attend without regard to their religious beliefs or sincerity, and were further allowed to partake of the sacrament which was ground peyote in capsule form.

The bona fides of the religious activity has also been the center of much recent case law; it is analogously contained in the regulations promulgated under the federal law. In 21 C.F.R. Section 320.4, an exception to the federal law controlling hallucinogenic drugs, states that:

> The listing of peyote in this sub-paragraph does not apply to nondrug use in bona fide religious ceremonies of the Native American Church; however, persons supplying the product of the Church are required to register and maintain appropriate records or receipts and disbursements of the article. (Emphasis added).

As was previously mentioned, a petition of the Church of the Awakening to allow its members to use peyote was recently denied. 35 Fed. Reg. 2874-77 (Feb. 12, 1970). Among other reasons for the denial, the hearing examiner said:

> There is a decided facility for drug abusers to enter into the membership of the Church of the Awakening. This would provide a ready means to acquire immunity from the law if the petition were granted. 'Bad faith' of future members and monitors is a real problem under the proposed requirements

> enumerated by the Church. Granting of the exemption would create serious breaches in drug abuse legislation and open the door to pseudoreligions conceived for the purpose of circumventing drug laws intended to control the misuse of drugs.

Id. at 2877.

The courts have also noted the possibilities of pseudoreligions and have examined the religions closely to determine if they were bona fide in their practice. In Kuch, supra, the defendant was found guilty of possession of LSD and for the unlawful transfer of marijuana. The court found that the defendant, a minister of the Neo-American Church, did not carry the burden of showing that her religious beliefs required her to ingest psychedelic drugs. The court said:

> There is a need to develop a sharper line of demarkation between religious activities and personal codes of conduct that lack spiritual import. Those who seek the constitutional protections for their participation in an establishment of religion and freedom to practice its beliefs must not be permitted the special freedoms this sanctuary may provide merely by adopting religious nomenclature and cynically using it as a shield to protect them when participating in antisocial conduct that otherwise stands condemned. In a complex society where the requirements of public safety, health and order must be recognized, those who seek immunity

> from these requirements on religious grounds must at the very least demonstrate adherence to ethical standards and a spiritual discipline.

Id. at 444. By contrast, although there is no real question respective to the sincerity of the Native American Church's belief in peyote, the particular ceremony in the instant matter (for the reasons enumerated, supra) is not a valid extension of that belief. The evidence before the Court is that the peyote religion is an Indian religion and that the Native American Church is an Indian church. These facts are unrebutted. Of all those who testified (which said testimony represents knowledge of and attendance at thousands of meetings of the Church), none was ever present at any other meeting where more Anglos were present than Indians. And with the exception of other meeting at Andy Scotts, no witness could testify about ceremonies where any large number of Anglos participated. Most of the testimony about Anglo participation regarded scientific or literary research. In fact, some witnesses testified that non-Indians had never been in attendance, and that they could not become members. The instant ceremony, therefore, should stand just as condemned as the "religion" in the Kuch case. In Leary, supra, the lower court decided the issue of whether the federal criminal statute relating to marijuana contravened Leary's first amendment rights. Leary claimed that marijuana was the sacrament in his religion. The lower court decided against Leary saying that, "if he could not use marijuana it would not affect his religious beliefs but he would consider it a violation of those beliefs and practices if he were denied its use." 383 F.2d at 857. Likewise, if the defendants in the instant matter were denied the

freedom to use peyote in non bona fide ceremonies it would not affect their religious belief because they would still be able to participate in bona fide ceremonies assuming the Native American Church decides to begin admitting Anglo members and does so. See State v. Attakai, decision of the Honorable Judge McFate, Superior Court of Arizona, July 26, 1960.

One law review commentator concludes:

> The use of illegal drugs including marijuana and LSD, even for ritual purposes, does violate the purposes of the laws prohibiting them, which assume that use for any non-medical purpose is harmful. Moreover, the use of such drugs is less tied to specific theological beliefs, and whatever religious attitudes are involved may be hard to distinguish from hedonism. The cases thus far seem to indicate that most users do not claim that the drugs are truly essential to communion with God. Dr. Leary did not make that claim, nor have others convicted of the use of peyote and marijuana, except for the Native American Church involved in the Woody case. Thus, effective drug laws could be maintained consistently with the privilege.

Clark, Guidelines for the Free Exercise Clause, 83 HARV. L. REV. 327, 363 (1969). It is obvious that the use of peyote was not essential to the worship of a diety in the non bona fide ceremony engaged in by the defendants in the instant matter.

If the government could not control the non bona fide religious use of peyote by members of the Native American Church there would be no way of stopping them from possessing, using, or presumably even distributing peyote as long as they merely recited the proper religious claims of immunity and sincerity. Such facile and perverted use of arguments for religious freedom should not be allowed to subvert and render unenforceable and meaningless the laws of the State of Arizona designed to protect the public from the spread of dangerous substances such as hallucinogenic drugs.

E. Summation

In conclusion, it is the position of the plaintiff that a violation of A.R.S. Section 36-1061 by these defendants has been clearly shown under the evidence, and that there exists a sufficient compelling state interest in enforcing that statute notwithstanding the claimed defense of freedom of religion. In the alternative, the plaintiff argues that if this Court is going to allow an exception to the enforcement of the criminal laws of this state based on freedom of religion, that such an exception should be limited to the use of peyote by Indians in bona fide religious ceremonies of the Native American Church, and that under the circumstances of this case and the evidence before this Court, the use of peyote in the instant case would not qualify under that exception because: (1) the defendants are not Indians; and (2) this was not a bona fide religious ceremony of the Native American Church because that church and the religion it practices are Indian, not Anglo nor a mixture thereof.

DATED AND RESPECTFULLY SUBMITTED

this 30th day of March, 1971.

/s/ William A. Flick
William A. Flick
Chief Deputy County Attorney
Coconino County

Copy of the foregoing mailed
this 30th day of March, 1971
to:

Richard K. Mangum
MANGUM, WALL & STOOPS
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and

Robert Cogen
1900 Avenue of the Stars
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Los Angeles, California

APPENDIX F

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCONINO

THE STATE OF ARIZONA, Plaintiff,	)	NO. 5650
vs.	)	DEFENDANTS' POST-TRIAL MEMORANDUM
JANICE WHITTINGHAM, et al, Defendants.	)	

The State's position is succinctly stated in the summation on page 15 of its post-trial memorandum:

A. There is no religious exception to A.R.S. 36-1061.

B. If there is an exception, it only benefits "Indians" in bona fide religious ceremonies of the Native American Church.

C. These Defendants are not "Indians" and their ceremony was not bona fide because the Native American Church is "Indian, not Anglo nor a mixture thereof."

As to argument A, that there is no religious exception, the weight of all modern authority is contrary to the State's view. Cases supporting Defendants are: People v. Woody, 40 Cal. Rep. 69,

394 P.2d 813 (1964); In re Grady, 39 Cal. Rep. 912, 394 P.2d 728, (1964); State v. Attakai, Superior Court of Coconino County, Arizona, Cause No. 4098 (1960); State v. Clark, No. 12,879, of the 49th Judicial District of Texas (1967); State v. Pardeahtan, Criminal Action 9454, Colorado.

The rationale of these cases is compelling. Other religious practice cases, such as Reynolds v. U.S. cited by the State are distinguished in the text of these decisions.

Use of peyote in bona fide religious ceremonies of the Native American Church cannot be very harmful or it would not be allowed under the Federal Regulations: 21CFR 320.4. According to Dr. Omer C. Stewart's testimony, similar use is allowed in the following States:

California, Idaho, Iowa, Kansas,
Michigan, Montana, Nebraska,
Nevada, New Mexico, Oklahoma,
Oregon, South Dakota, Texas,
Utah, Wyoming and Washington.

In three States it is illegal: Arizona, Colorado and Minnesota. Arizona and Colorado Courts have ruled contrary to the Statute, however, in the Attakai and Pardeahtan cases, respectively.

Also, David Clark testified that the Navajo Tribe with the blessing of the Bureau of Indian Affairs legalized peyote for religious use in October, 1967.

There is a long history of religious use of peyote. It was observed in Mexico in the 1500's. Historically, the groups or classes of people who

use peyote religiously are not dropouts or ne'erdowells. In fact, they are known as upright and valued members of their societies. Thus centuries of experience show that peyote so used is not harmful on society.

The peyote religion cannot exist without peyote. Its use in the religion generally is not so harmful as to justify State prohibition. Its use specifically in this case meets all the criteria of the cases, statutes and regulations exempting its prohibition. Therefore, the statute A.R.S. 36-1061 would be unconstitutionally applied to these Defendants.

As to its argument B, the State seems to concede that the Court will recognize the religious exemption in the case at bar as it did in Attakai some ten years ago. Therefore, it attempts to distinguish and disallow the exemption here on the basis of "Indianhood." While the concept of defining an Indian seems difficult and complex, the State clearly took the position during trial that it was distinguishing approved from disapproved use on a racial basis.

If this be true, then the State would limit religious use of peyote on a "blood" or genetic basis, and one must become an ethmologist, anthropologist and genealogist to know whether he can attend a Native American Church meeting.

The State would apparently exclude adopted or blood brothers or honorary "Indians" who have ceremonially or otherwise been classified as members of an Indian tribe. It would also seem to exclude spouses and perhaps offspring. Further, the State fails to show what degree of "Indianhood"

qualifies a person so that he may be free from prosecution as the State follows its whim. Is it one drop of blood? Is it one-quarter blood? If a one-eighth blood male marries a one-eighth blood female, are their offspring one-quarter blood? May the children then observe the peyote religion in tranquility while their parents risk prosecution? Would the same be true for the offspring of a one-half Indian who marries a non-Indian and elects not to enroll the offspring as an Indian in the tribal records? Is it a matter of enrollment which qualifies one? Is it a matter of living on a reservation? What of persons who are "Blood Indians" but not "enrolled Indians" - such as the Lumbee Tribe? What of the thousands of persons of Indian ancestry who are "genetic" but not "enrolled" Indians?

The above questions, unanswered by the State's approach to the problem, are meant to illustrate the vague thinking involved and the inherent problems created thereby. If ever a legal concept were so vague as to be unconstitutional, this is it.

As well as lacking any definitions or standards in its position, the State fails to show any rational basis for the "Indian" versus "non-Indian" distinction.

Assuming arguendo that one knew who an Indian was in the State's eyes and whether offspring and relatives by marriage were qualified, why is there or should there be any difference?

Historically is there any precedent for the State to promulgate a law which can constitutionally discriminate religious practice on a racial basis?

Either discriminating racially or passing a law regulating a religion alone are each unconstitional(sic). To combine them is to compound the affront to the Bill of Rights. This Court should stand firm and not concede to such an illegal concept.

Physiologically, is there reason to discriminate? The State has not shown that a "full-blood Indian" and one who is one-quarter Greek, one-quarter Scotch-Irish, one-quarter Chinese, and one-quarter Dutch (orwhatever mixture one cares to select) reacts under the influence of peyote any differently each other or from any other human being.

The State's argument throughout assumes a racial or genetic purity approach to humanity. This concept found full flower in Nazi Germany with the well-known disastrous consequences. Perhaps the State has a "final solution" to the "Anglo" problem. At any rate, it would seem to seek to forever bank the fires of the Melting Pot and reverse the glories of that most American concept.

Dr. Stewart testified that nothing in the Native American Church's history suggests racial discrimination and he related instances giving the lie to the State's "pure Indian" approach to religion.

The State rests its claim on the non-Indian argument on the testimony of David Clark, Howard Nez, Sr., and James King. It speaks of the Native American Church as if it were a monolithic entity. Even the State's witnesses fail to support this view. Clark is affiliated with a Native American Church of North America. Frank Takes Gun is its President. Nez and King are affiliated with a Native American Church of North America. Leonard Springer is its President. (Nez and King, by the way, belong to

the Native American Church of the Four-Corners -- membership 200 persons. Approximately the same membership as the Native American Church of Parks, Arizona). For that matter, Dr. Stewart testified that an All Races branch had been affiliated with one of the Native American Churches of North America. The State's witness King conceded that he didn't know of the outcome of their effort. Clark stated that his Native American Church of North America didn't adopt a non-Indian plank until 1969 (perhaps after October 18? The record is silent).

Be that as it may, the parent church is the Native American Church of Oklahoma, incorporated in 1918. The Court heard from two authorities of that Church, Fred Hoffman and Sam Buffalo. It has 70,000 members, includes many tribes, has members in various States and does not discriminate racially. The Native American Church of Parks, Arizona, was created under the guidance of members of this Church, not others.

The State fails on constitutional gounds (sic), scientific grounds and historical grounds to support its "Indians only" approach.

The only argument offered to sustain its view is found in its memorandum on page 3, lines 21-25: that is that the number of "Indians" is relatively small and they are found on reservations.

Small as compared to what: Serbo-Croations, Annamese, Balts, redheads, midgets, hunchbacks? One is moved to ask whether men are or are not created equal in the State's eyes. Fred Hoffman testified that there are 350,000 peyotists now. In 1960 the figure was 200,000. So the religion is

growing. It is a proselytizing religion. Small? How many Jainists are there in the U.S.? How many Zoroastrians? Are they entitled to any more or less protection due to their number? Is the State suggesting that it can someday constitutionally decide there are enough or too many peyotists and then and therefore cut them off? What does religious freedom mean to the State of Arizona?

The argument that the Indians are tolerated on reservations is both old and dishonorable. The State is, in effect, saying, "Keep your place, Indian." (Substituting "nigger" for Indian reveals the source of this argument).

Mrs. Whittingham, the unrebutted evidence shows, is a Blackfoot Indian. To what reservation in the State of Arizona would she go?

The Federal Regulation allowing use of peyote in bona fide ceremonies of the Native American Church doesn't say anything about a limitation to Indians. The Grady case specifically denied such a specious limitation. Dr. Stewart testified that Mana Pardeahtan was only a self-professed Indian who looked like a non-Indian and who organized an All Races Church. Why should the Courts in Arizona make a racist decision?

The Defendants note with interest that throughout its memorandum, the State uses the term "Anglo". The 1967 edition of the unabridged Random House Dictionary defines Anglo as, "an English-speaking American of north-European ancestry". Thereby is the State offering further confusion and improper discrimination? Is a person who would otherwise be an Indian a non-Indian Anglo because he can speak English? Is a

Yiddish and Hungarian-speaking Hungarian Jew eligible for membership in the Native American Church according to the State because he doesn't speak English and is a southern European? The mind boggles.

Lacking clear-cut, rational and justifiable guidelines, how can the State enforce this law impartially? It cannot. The case at bar illustrates it. Charges have been dismissed against the "Indian" defendants - most recently by the juvenile judge on religious reasons by stipulation of the State: a copy of a Minute Entry is attached. The record is again silent as to Henry Hutchinson's parentage, bloodlines, English-speaking ability, and north-European heritage or lack of it. Is Janice Whittingham any less Indian than he is?

The State's final argument is its most debased.

In its eyes, the Defendants are not Indians. Why not? Isn't their skin dark enough? Or red enough? Should they have hooked noses, or higher cheekbones, or rounder eyes? Do they not smell like Indians? Should they have ridden to trial in the back of a pickup? Janice Whittingham's grandfather was a full blood Blackfoot. Using the State's standards, she would be one-quarter Blackfoot. Need she be more? How much more? Gregory Whittingham has Algonquin ancestry. Not enough? Do we need more proof? Does the State want a blood test? Its argument here, as so many others is readily pushed to the point of absurdity and its weaknesses revealed thereby.

As to the ceremony, Fred Hoffman, a peyotist of some fifty years' standing and an

ex-officer of the Native American Church of Oklahoma, the parent church, declared on the stand that the meeting in question was lawful. None of the State's witnesses stated that it was not lawful or bona fide. At worst, they only said there were features about it unusual to them.

Listen to the State: the meeting was not bona fide because of the following False Standards: (1) money was collected prior to the service; (2) it had "Anglo" sponsors; (3) "Anglos" were married; (4) the Altar shape was unsual (sic) and the fire was built by agents; (5) capsules were used; and (6) it was open to the public.

Are Mormon Church services invalid because tithes are collected instead of donations being given after the ceremony? Apply False Standard Number One to any church you'd care to select and ask if this isn't an absurdity. Also, the only persons who paid in advance were narcotics agents using marked money. They anticipated that the meeting would be raided before its completion. They had to make Scott accept the marked money in advance in order to get it into his possession, so they pressed it on him. They all admitted that it was a donation or offering even so.

False Standard Number Two: "Anglo" sponsors may be unusual in the heart of the reservation, and understandably so. But they certainly weren't unknown or unusual at Parks.

False Standard Number Three: "Anglos" were wed. The same point as above pertains. Also Defendants reiterate their rebuttal to the "pure Indian" argument already made elsewhere in this memorandum.

False Standard Number Four: The fire was built by agents. Did it burn less hotly? It was acceptable to Dan Chee, the road chief, why not to the State? Defendants dispute that the agents built the fire anyway. They were given permission early in the afternoon to build a fire to warm themselves, but there was no testimony that this was the same fire used at 9:00 o'clock that night. Did they use extra-long burning wood? When is a fire not a fire? What difference does it make?

The alter shape was unusual. The road chief made it. The photos of it are vague. How unusual was it? Was it sacrilegious? Heretical? Damnable? It was simply unusual. Again, so what?

False Standard Number Five: capsules were used. Almost all the witnesses, including those of the State, knew of the use of capsules in many different localities. While an innovation, perhaps, they are not condemned. Their purpose, based on the testimony of the vile taste of peyote, is obvious and legitimate. Ralph Turtle, for one, a 30-year road chief, approved of them and described their usage in other places.

False Standard Number Six: The meeting was open to the public. Let's see the State apply this one to all churches equally! In two generations there will be no more churches if this is literally taken to heart. The State's concept swallows its own tail: church members only. How do you become a member? By attending a meeting. If a non-member can't attend, you get no new members.

Such a standard would remove the peyote problem all right. The church couldn't get any

new members and when the old ones all died off, there'd be the end of it. Tidy. Unconstitutional.

During the trial, the State made stabs at other False Standards: wearing of old clothing, laughter, etc. It had the wisdom not to sully its memorandum with them, apparently selecting only what it considered the strongest or most negative points. But even these are seen to be specious. They boil down to what was usual to the State's witnesses. Remember, however, that their witnesses are all Navajos living on reservations. These witnesses might find several unusual features about peyote ceremonies of the Menominees in Michigan, the Otoes in Oklahoma, or the Winnebagoes in Wisconsin. The expert testimony was that there is a basic ritual with variations according to local custom and the road chief's dictates. Ralph Turtle even testified that he had been to a meeting on a reservation where more non-Indian than Indians attended.

Some of the cases cited by the State don't apply: Bullard, Kuch, Leary. The Neo-American Church is a far cry from the Native American Church of Parks, Arizona. It was conceived in cynicism, had no real religious purpose or moral standards. Its motto was "Victory Over Horseshit", which is indicative of its whole attitude. LSD is a far more potent substance than peyote. No tradition or heritage supported these practices.

Instead, Defendants re-direct the Court to the Native American Church cases. The Big Sheep case in Montana is the only contrary case, but is not persuasive, especially in view of the fact that

the Montana legislature amended its law to allow peyote for religious use after the decision.

The Court is respectfully urged to follow the doctrine of the Woody, Grady, Clark, Pardeahtan and Attakai cases, the sixteen State statutes and the Federal Regulations.

Self-controls abound in the situation to prevent abuse. Experienced road crews are limited in number. The supply of peyote in Texas is limited to bona fide Native American Church members. Road chiefs who are wise in the ways of people reacting to peyote run the meetings and are able to help those who need help. The participants remain under guidance all night, leaving only in the morning after the effects are worn off. No one is allowed to take peyote away for consumption off-premises.

If the local church or the sponsor or the road chief wishes to limit membership or attendance, so be it. That is religious freedom. But for the State to limit religious practice on a racial basis cannot be supported. This Court should uphold the use of peyote in bona fide religious ceremonies of the Native American Church as a general proposition. Then, specifically, based on the evidence before it, this particular ceremony should be declared bona fide. The Defendants Whittingham were obviously present for sincere purposes, and the case against them should be dismissed.

The issues involved here are perhaps seen more clearly by making a comparison: Attached hereto as Exhibit B is a newspaper article which appeared while this Memorandum was being written; it discusses a

phenomenon of young people turning to a fundamental Christian religion. One notes with interest certain elements common to the case at bar: an appeal to young people of mixed backgrounds; the entry of the young people into a religion not previously frequented by them; their feeling of being pushed around by the police; wearing of garments not commonly worn to church services; and, most especially, the fact that many churchmen look on them with suspicion as "Misguided kids looking for a new high and a quick solution to all their anxieties."

Let us imagine a religion suddenly being frequented by numbers of young people; that some churchmen suspect they are there to abuse the religion or its sacrament, the wine.

It can then readily be seen that the regulation of attendance would be an internal matter for the church involved, and not an arena which the State should enter in an exercise of its criminal laws.

So be it with the peyote religion. If the particular church confronted with a person desiring admission to its service declines to allow him, that is religious freedom. It is readily anticipated that some would be allowed and some would not.

But for the State to declare that it will regulate church attendance and the use of sacrament on a racial basis flies in the face of the constitutional guarantees of religious freedom.

In the case at bar, Andrew Scott practiced his religion on non-racial lines, according to the tenets of his teachers, who were from the tolerant Native American Church of Oklahoma. He too was tolerant, and after building his church, held services which all were welcome to attend. The Defendants,

sincere in their motivation, arranged their wedding in his church and a veteran road crew was obtained. The basic ritual was followed, with some local variations, up to the point of interruption and arrest.

The State has already conceded by its action that possession of peyote for religious purposes is exempt from prosecution. But it should not go further and attempt to regulate the membership of the church or those who may attend its meetings on a racial basis. To do so it does in effect make a law respecting the establishment of religion or prohibiting the free exercise thereof. It also directly discriminates racially. Both kinds of activity are unconstitutional.

Thus it is not enough for the State to present the views of some intolerant churchmen to the Court and to ask the Court to apply these views retroactively to a meeting and a church over which they had no control. The State has failed to show any legitimate reason to deprive these Defendants of the religious freedom it has granted to others.

So failing, the State should not prevail. The law is unconstitutionally sought to be applied against these Defendants, and the charge against them should be dismissed.

Respectfully submitted this 14th day of April, 1971.

MANGUM, WALL AND STOOPS

By /s/ Richard K. Mangum
Richard K. Mangum
Attorneys for Defendants

A copy of the foregoing
delivered this 14th day
of April, 1971, to:

Mr. J. Michael Flournoy
Coconino County Attorney
Court House
Flagstaff, Arizona 86001

/s/ Richard K. Mangum
Richard K. Mangum

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCONINO

/s/ Laurance T. Wren Judge

Division 1

_____ Court Reporter

Billie Yost, Clerk

Jo Wycoff Deputy Clerk

Date March 26, 1971

MINUTE ENTRY

In the Matter of HENRY C. HUTCHISON, A person under the Age of eighteen years.	)	Case No. J-1912

ACTION:

APPEARANCES:

The Arizona Attorney General and the County Attorney having stipulated with counsel for the respondent-minor that charges of Possession of Peyote be dismissed under the religious immunity doctrine of the United States Constitution;

IT IS ORDERED that the Petition filed November 25, 1969 be, and the same is hereby, dismissed.

cc: County Attorney
Juvenile Dept.
Richard K. Mangum
William F. Garbarino
File

APPENDIX G

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCONINO

THE STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	NO. 5650
	)	
vs.	)	PLAINTIFF'S POST-
	)	TRIAL REPLY
JANICE WHITTINGHAM, et al.,	)	MEMORANDUM
	)	
	)	
Defendants.	)	
	)	

COMES NOW the plaintiff, by and through William A. Flick, Chief Deputy County Attorney, Coconino County, and replies to the defendants' Post-Trial Memorandum as follows:

I

The Native American Church is an Indian church practicing an Indian religion. See United States v. Kuch, 288 F. Supp. 439, 35 ALR3d 922 at page 934 (1968). Also People v. Woody, 394 P.2d 813 at page 817 (1964). Also Leary v. United States, 383 F.2d 851 at page 861 (1967), quoting Woody. Also State of Arizona v. Mary Attakai, Coconino County Superior Court Cause No. 4098 (1960) (Page 2 of Decision of the Honorable Yale McFate). Also State of Texas v. David S. Clark, No. 12,879 of the 49th Judicial District of Texas (1967) (Page 2 of Decision).

II

The State of Arizona has never conceded by any action whatsoever that the possession of peyote for religious purposes is exempt from prosecution in the State of Arizona. The minute entry which was attached as Exhibit "A" to defendants' Post-Trial Memorandum was in error as to the reason for the dismissal of charges against the nine Navajo adults and one juvenile in this case. Charges were dismissed against those persons in exchange for the dismissal with prejudice of a Federal lawsuit filed by those persons against the narcotics agents of the State of Arizona and other persons. See plaintiff's Exhibit "1" and Exhibit "2" attached hereto and incorporated herein by reference.

III

The State has always contended in this matter that there is a compelling state interest sufficient to prohibit the use of peyote by any persons in this state regardless of the purpose, motive or intentions of those persons.

In this regard, we cite 35 ALR3d 922-951 which is United States v. Kuch, 288 F. Supp. 439 (1968) and Annotation thereto entitled "Free Exercise of Religion as Defense to Prosecution for Narcotic or Psychedelic Drug Offense."

The court in Kuch states as follows (P. 448-449 of 288 F. Supp.)

In People v. Woody, 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P. 2d 813 (1964),

the California Supreme Court broadly applied the tests of Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L. Ed. 2d 965 (1963), and held that a state statute prohibiting the unauthorized use of peyote could not constitutionally be applied to a member of the Native American Church. The Native American Church, made up of from 30,000 to 250,000 American Indians, had a "long history" of the use of peyote. The Court found that:

> 'Although peyote serves as a sacramental symbol similar to bread and wine in certain Christian churches, it is more than sacrament. Peyote constitutes in itself an object of worship; prayers are directed to it much as prayers are devoted to the Holy Ghost. On the other hand, to use peyote for nonreligious purposes is sacrilegious. * * *' 40 Cal. Rptr. 69 at 73, 394 P. 2d 813 at 817.

Against the "virtual inhibition of the practice of defendants' religion" imposed by the state statute, the California court balanced the state's interest in enforcing the statute in order to determine whether that interest was so "compelling" as to necessitate "an abridgement of defendants' First Amendment right." The

court found that the record did not support "the state's chronicle of harmful consequences of the use of peyote" and held in favor of an exemption for the defendant members of the Native American Church.

Defendant asserts that marijuana is less harmful, or no more harmful, than peyote and that under the reasoning in Woody, she is entitled to an exemption from the Marihuana Tax Act. This Court, however, is not bound by decisions of the California Supreme Court. While it may appear incongruous that the court found, on the one hand, that the state had not shown that peyote had harmful consequences and yet found, on the other hand, that peyote "engenders hallucinatory symptoms similar to those produced in cases of schizophrenia, dementia praecox, or paranoia"--that problem is not before the Court.

That problem is before this Court, however, and the State submits that the evidence before this Court, to-wit: the testimony of Dr. Seevers, is clearly sufficient to allow this Court to find that the legislature of the State of Arizona was legally correct in its determination that the use of peyote is against the public interest and should be prohibited. Unlike Woody, the prosecution in the instant case has clearly shown a compelling state interest.

Kuch also states (P. 448 of 288 F. Supp.):

> The Court is not required nor would it be proper to substitute its judgment for that of the Congress. It is only necessary to examine the facts to determine whether in view of the restriction which the Marihuana Tax Act places on the acts of members of the Neo-American Church, Congress had a rational basis for the enactment and whether there continues to be a substantial basis for its continued enforcement. This is something quite different from what Kuch seeks for she would have the Court determine that those who feel marihuana is practically harmless and even socially beneficial have the better of the argument over those who feel the drug is harmful and socially most undesirable. The Court is not the legislature and the legislature has spoken. It is sufficient to determine and the Court so finds that Congress had a rational basis for passing the Act and that there is a substantial body of informed expert opinion which continues to support and indeed to underline and emphasize the very reasons that led Congress to enact the law in the first instance.

In the instant case the legislature has likewise spoken, and its decision that the use of peyote in this State is unlawful should be upheld by this Court.

DATED and respectfully submitted this 27th day of April, 1971.

/s/ William A. Flick
William A. Flick
Chief Deputy County Attorney
Coconino County, State of Arizona

COPY of the foregoing
mailed this 27th day of
April, 1971 to:

Richard K. Mangum
MANGUM, WALL & STOOPS
P. O. Bin 10
Flagstaff, Arizona 86001

and

Robert Cogen
1900 Avenue of the Stars
Suite 2510
Los Angeles, California

EXHIBIT 1

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCONINO

Laurance T. Wren Judge

Division 1

Court Reporter

Billie Yost, Clerk
Jo Wycoff Deputy Clerk

Date April 15, 1971

MINUTE ENTRY

In the Matter of	)	
HENRY C. HUTCHISON,	)	
A person under the	)	Case No. J-1912
Age of eighteen years.	)	
	)	

ACTION:

APPEARANCES:

It having been demonstrated to the Court that the minute order dated March 26, 1971 in the above-captioned matter is incorrect in that it specified that the grounds for dismissal therein ordered was the religious immunity doctrine of the United States Constitution;

IT IS THEREFORE ORDERED that said minute order be corrected in that the dismissal is pursuant to the grounds stated in the stipulation and order entered into in Cause No. CIV-69-544-PCT-WEC, Chee v. Wren, United States District Court, dated the 29th day of September, 1970.

cc: County Attorney
Andy Scott
Juvenile Dept.
File

EXHIBIT 2

THEODORE R. MITCHELL
Attorney for Plaintiffs
Address:
Dinebeiina Nahiilna Be agaditahe, Inc.
P. O. Box 306
Window Rock, Arizona 86515
Telephone: 602-871-4151

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

DAN CHEE, JOE CHARLEY, CHEE YABENEY, LESTER BOONE, NED JOHNSON, TOM MARSHALL, SAM BOONE, HARRY RIGGS, BILLY NEZ, and JAMES YABENEY, A Minor, By His Natural Father and Guardian Ad Litem, CHEE YABENEY,	)	NO. CIV-69-544-PCT-WEC
Plaintiffs,	)	STIPULATION
vs.	)	
LAURENCE WREN, J. THOMAS BROOKS, MICHAEL FLOURNOY, CECIL RICHARDSON, PHILIP L. MORGAN, THOMAS HAMMERSTROM, RONALD MASKELL, WALT BREHM, MICHAEL BERTOCCHI, GENE ANDERSON, TERRY CROP, OTIS THRASHER, CHARLES ALLAN, STEVEN JONES, RALPH ROBINSON, JOHN COZAD, and K. M. QUINN,	)	
Defendants.	)	

IT IS HEREBY STIPULATED that the criminal action pending against the plaintiffs in the Superior Court of Arizona, Coconino County, styled and numbered, State of Arizona v. Dan Chee, Joe Charley, Chee Yabeney, Lester Boone, Ned Johnson, Tom Mike Marshall, Sam Boone, Harry Riggs and Billy Nez, Criminal No. 5650, shall be dismissed with prejudice as to these named parties; and

The juvenile proceeding against James Yabeney, styled and numbered, In the Matter of James Yabeney, Juvenile No. 1910, pending in the Juvenile Court of Arizona for Coconino County, shall be dismissed with prejudice; and

This action and complaint shall be dismissed with prejudice as to all the plaintiffs.

DATED this 29th day of September, 1970.

/s/ T. R. Mitchell
THEODORE R. MITCHELL
Counsel for Plaintiffs

GARY K. NELSON
The Attorney General

/s/ Rod McDougall
ROD MC DOUGALL
Assistant Attorney General
Attorneys for Defendants

J. MICHAEL FLOURNOY
Coconino County Attorney

By /s/ William A. Flick
WILLIAM A. FLICK
Attorneys for Defendants

APPROVED BY THE COURT this _____ day of _____, 1970.

/s/
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

DAN CHEE, et al.,	)	
	)	
Plaintiffs,	)	NO. CIV-69-544-PCT-WEC
	)	
vs.	)	ORDER
	)	
LAURENCE WREN, et al.,	)	
	)	
Defendants.	)	
	)	

ALL PARTIES hereto having stipulated by and through their respective counsel that the within cause shall be dismissed with prejudice to the parties, and having further stipulated that the pending criminal prosecutions in the Superior Court of the State of Arizona in and for the County of Coconino shall be dismissed as to the plaintiffs in the within cause, and good cause appearing therefor;

IT IS HEREBY ORDERED that the Complaint herein and this cause of action is hereby dismissed with prejudice.

/s/
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

DAN CHEE, et al, Plaintiffs, vs. LAURENCE WREN, et al, Defendants.	)	NO. CIV-69-544 PCT-WEC ORDER
NATIVE AMERICAN CHURCH OF NAVAJOLAND, INC., et al, Plaintiffs, vs. ARIZONA CORPORATION COMMISSION, et al, Defendants.	)	NO. CIV-70-401 PHX-WEC ORDER

Theodore R. Mitchell present for plaintiffs. Gary K. Nelson and William A. Flick present for defendants.

Counsel for all parties stipulate to the following:

1. That Cause No. Civ-69-544 Prescott, Dan Chee, et al v. Laurence Wren, et al may be dismissed with prejudice.

2. That counsel will prepare a formal stipulation and Order for Dismissal.

3. That the depositions heretofore taken by the parties in preparation for trial in Cause No. Civ-69-544 Prescott may be offered in evidence in Cause No. Civ-70-401 Prescott, Native American Church of Navajoland, Inc., et al v. Arizona Corporation Commission, et al.

It is further stipulated by counsel for defendant Indians that prosecution which is now pending in the Superior Court of the State of Arizona in the County of Coconino will be dismissed with prejudice.

IT IS ORDERED that the time set for pretrial conference on October 16, 1970, and for trial on December 14, 1970, in Cause No. Civ-69-544 Prescott is vacated.

IT IS FURTHER ORDERED that Cause No. Civ-70-401 Prescott is set for pretrial conference at Prescott, Arizona, on December 4, 1970, at 2:00 o'clock p.m. and for trial at Phoenix, Arizona, on December 14, 1970, at 2:00 o'clock p.m.

DATED: September 29, 1970.

/s/ Walter E. Craig
United States District Judge

Copy to Theodore R. Mitchell
Gary K. Nelson
J. Michael Flournoy
Daniel Cracchiolo

APPENDIX H

RELEVANT PORTION OF PETITIONER'S ANSWERING BRIEF

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA,	)	
	)	
Appellee,	)	NO. 1 CA-CR 443
	)	
vs.	)	Coconino County
	)	No. CR-5650
JANICE WHITTINGHAM and GREG WHITTINGHAM,	)	
	)	
Appellants.	)	
	)	

APPELLEE'S ANSWERING BRIEF

GARY K. NELSON
The Attorney General

By JAMES R. REDPATH
Assistant Attorney General

By ROD McDOUGALL
Assistant Attorney General
206 South 17th Avenue
Phoenix, Arizona 85007
Attorneys for Appellee

* * *

STATEMENT OF THE CASE

This is a criminal action brought by the State of Arizona in the Superior Court of Coconino County against the appellants, charging them with the unlawful possession of peyote in violation of A.R.S. § 36-1061.

Appellants admitted that they were in possession of peyote and claimed that they were rightfully entitled, regardless of A.R.S. § 36-1061, to possess said plant based upon the First Amendment to the Constitution of the United States which guarantees religious freedom.

The issues presented at the trial of this matter were as follows:

1. Were the appellants engaged in a bona fide religious ceremony so as to be afforded them the protection of the First Amendment to the United States Constitution?

2. If appellants were engaged in a bona fide religious ceremony and were sincere participants, does the State of Arizona, nevertheless, have an overriding, compelling and substantial interest in preventing the use and possession of peyote for the protection of the public notwithstanding the First Amendment to the United States Constitution guaranteeing religious freedom?

Judge Brooks, in a written opinion, found as to the first issue presented, that the appellants possessed and used peyote; that the ceremony attended by appellants substantially followed the

recognized form of a service of the Native American Church and was for the purpose of blessing the marriage of appellants and another couple; that appellants were serious and sincere participants in what they considered to be a ceremony having religious significance. As to the second issue presented, Judge Brooks found as follows:

> "By reason of the distortions of perception caused by the ingestion of peyote, together with the other possible psychological and physiological results described earlier in this memorandum, the substance is subject to abuse and could conceivably result in a person being dangerous to himself or to the person or property of others. There is enough of a danger in peyote to qualify as a compelling interest of the State in upholding a valid statute prohibiting its possession.
>
> The Court finds that the goal of preservation of public health, safety and order is of a sufficient interest to society and that the use of the hallucinogenic vegetable known as peyote may thus be rightfully prohibited." (page 5, original written opinion)

Based upon the finding regarding the second issue presented, Judge Brooks found the appellants guilty of the crime charged.

* * *

QUESTIONS PRESENTED FOR REVIEW

Appellants have listed two questions as presented for review, yet their argument is directed to a third distinct question. Appellee will hereinafter attempt to clarify the issues for this court.

1. May the State of Arizona Enjoin the Possession of Peyote When It is Put to Nondrug Use in Bona Fide Religious Ceremonies of the Native American Church?

2. Is it a denial of due process to appellants for the State not to prosecute others committing the same acts based on racial grounds or for others to be acquitted of the same charge for no better reasons than those which apply to appellants?

3. Does the State of Arizona have an over-riding and compelling public interest in the enforcement of A.R.S. § 36-1061, which supersedes and overrides any Constitutional, First Amendment, Religious Freedom arguments?

ARGUMENT I

1. May the State of Arizona Enjoin the Possession of Peyote When It is Put to Nondrug Use in a Bona Fide Religious Ceremony of the Native American Church?

3. Does the State of Arizona have an over-riding and compelling public interest in the enforcement of A.R.S. § 36-1061, which supersedes and overrides any Constitutional, First Amendment, Religious Freedom arguments?

Appellants have erroneously framed the first question presented for review. A brief perusal reveals in fact they are asserting a First Amendment, Constitutional argument in support of their use and possession of peyote on the night in question and the question presented for review is actually as listed in the third question presented above. Appellee will, therefore, combine questions 1 and 3 in response.

In the first instance, appellants do not define the terms "nondrug use", nor has appellee, in its research, ever seen such a definition. It is submitted that in fact there is no such thing as a "nondrug use" of drugs when dealing with narcotics or hallucinogens such as peyote.

Secondly, the testimony and evidence introduced at the trial and the ultimate findings of fact and opinion rendered by the trial court do not support appellants' question number 1.

The trial court did not find that the gathering in Parks, Arizona, on October 18, 1969, was a bona fide ceremony of the Native American Church. The court found only that the ceremony "substantially followed the recognized form of a service of the Native American Church . . ." While this distinction at first blush might seem to be rather insignificant, for reasons which will be elaborated upon hereinafter, it is a vital one.

The trial court at no time made a finding that the use of peyote at the gathering in Parks, Arizona, was a nondrug use, nor did the court ever find that the use of peyote was not dangerous. The court found that, when taken internally, peyote can produce temporary hallucinations and can result in

convulsions and ultimately death. (Opinion Appendix B, page 4)

It is, thus, apparent that the first question presented by appellants is completely unrelated to the actual findings of the trial court.

As was shown at the time of trial and as evidenced by the findings of the trial court, the gathering on October 18, 1969, at Parks, Arizona, was not a bona fide ceremony of the Native American Church, though similar. Merely applying a label or name to a particular group or activity and calling it one thing does not make it in fact that thing. Thus, calling the gathering at Parks a Native American Church ceremony did not make it a Native American Church ceremony.

Appellants have cited the court to State v. Attakai, Coconino County Cause Number 4098, a 1960 Superior Court decision in support of their argument. (See Exhibit A of Appellants' Opening Brief) The trial court there made some very significant findings of fact which had a direct bearing on his ultimate conclusions of law. The court found at page 2, Appendix A, Appellants' Brief, that:

> "There is no significant use of peyote by persons other than Indians who practice peyotism in connection with their religion . . ." (Emphasis added)

The trial court then went on to discuss the significance of peyote in this Indian religion at page 3, Appendix A, Appellants' Brief:

> ". . . It is conceived of as a sacrament, a means of communion with the Spirit of the Almighty--and as an object of worship, itself, as having been provided for the Indian by the Almighty." (Emphasis added)

And further on page 3, Appendix A, Appellants' Brief:

> "First, the only significant use made of peyote is in connection with Indian rites of a bona fide religious nature . . ." (Emphasis supplied)

It is readily apparent from the foregoing cited language that one of the prime considerations in the trial court's decision was the fact that the religion is an Indian religion and the individual involved was a Navajo Indian.

This has relevance for this court only in the fact that the Native American Church has a long history and cultural background tied very closely to the mores, culture and religious rites of the Indians. The gathering at Parks was not so steeped in history nor tied to the culture of the Indians. Nor can it be integrated with that background by merely calling it the Native American Church of Parks, Arizona.

See United States v. Kuch, 288 F. Supp. 439 (1968) at page 443:

> ". . . Those who seek the constitutional protections for their participation in an establishment of

> religion and freedom to practice its beliefs must not be permitted the special freedoms this sanctuary may provide merely by adopting religious nomenclature and cynically using it as a shield to protect them when participating in antisocial conduct that otherwise stands condemned. . . ."

It is clear that appellants did not convince the trier of fact that this was a true, bona fide Native American Church ceremony as that ceremony or ritual has developed historically. (See Appendix C for copy of Judge Wren's decision based on this same ceremony at Parks).

The purpose of all this argument is to point up as graphically as possible the inherent danger in allowing complete unchecked, uncontrolled practices in the name of religious freedom. It would be a simple matter indeed to profess a belief in the use of most any drug or narcotic as a religion. With the test that appellants would apply, then no one could ever challenge that professed belief.

The Supreme Court of the United States has long recognized that religious freedom is not an absolute right subject to no controls whatever. In Reynolds v. United States, 98 U.S. 145, 25 L. Ed. 244 (1878) at pages 166 and 167:

> ". . . Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that

> human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?
>
> So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

The question then becomes what is protected in the name of religion and what is not. As the court said in Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) at page 403, a protection is not afforded:

> ". . . because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate. . .'" (Citations omitted)

There has been no challenge raised here by appellants that the State has no right to regulate and control narcotics and dangerous drugs. The trial court's decision in finding appellants guilty of the crime as charged rests squarely on the fact that the state does have a "compelling and overriding interest in the control of peyote." See Appendix B, at page 5:

> "The ultimate question presented to this Court, therefore, is whether there is a compelling or substantial interest permitting the Legislature of the State of Arizona to infringe upon the defendants' First Amendment rights to freedom of religion.
>
> By reason of the distortions of perception caused by the ingestion of peyote, together with the other possible psychological and physiological results described earlier in this memorandum, the substance is subject to abuse and could conceivably result in a person being dangerous to himself or to the person or property of others. There is enough of a danger in peyote to qualify as a compelling interest of the State in upholding a valid statute prohibiting its possession.
>
> The Court finds that the goal of preservation of public health, safety and order is of a sufficient interest to society and that the use of the hallucinogenic vegetable known as peyote may thus be rightfully prohibited.

> The possibility of misuse or abuse of peyote is somewhat graphically illustrated by testimony that during the ceremony at Parks, Arizona, certain members of the congretation (sic) were observed placing handfuls of peyote capsules in their pockets."

It is patently clear from the record that the State has a compelling interest in the regulation of peyote, and that it is a dangerous drug. The testimony was uncontroverted and the court so found. With this finding it is appropos to note the language of the court in Leary v. United States, 383 F.2d 851 (1967) at page 861:

> ". . . It would be difficult to imagine the harm which would result if the criminal statutes against marihuana were nullified as to those who claim the right to possess and traffic in this drug for religious purposes. For all practical purposes the anti-marihuana laws would be meaningless, and enforcement impossible. The danger is too great, especially to the youth of the nation, at a time when psychedelic experience, 'turn on,' is the 'in' thing to so many, for this court to yield to the argument that the use of marihuana for so-called religious purposes should be permitted under the Free Exercise Clause. We will not, therefore, subscribe to the dangerous doctrine that the free exercise of religion accords an unlimited freedom to violate the laws of

the land relative to marihuana."
(Emphasis supplied)

And see State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966) at page 569:

> "The defendant may believe what he will as to peyote and marijuana and he may conceive that one is necessary and the other is advisable in connection with his religion. But it is not a violation of his constitutional rights to forbid him, in the guise of his religion, to possess a drug which will produce hallucinatory symptoms similar to those produced in cases of schizophrenia, dementia, praecox, or paranoia, and his position cannot be sustained here--in law nor in morals."

And see Lewellyn v. State, Okl.Cr., 489 P.2d 511 (1971) at page 515:

> "The concern of this Court is not only for the religious freedom of the defendant, guaranteed by the Constitution, but also for the laws of the State of Oklahoma, which defendant admittedly, knowingly, and purposefully violated because they conflicted with his personal religious beliefs and practices. Defendant advocates the use of marihuana, in that 'it brings a person closer to God, makes him less violent, more peaceful, and more loving toward his brother man.' We do not inquire in the truth or veracity of defendant's religious beliefs, since

> the same is not at issue here. We are of the opinion that the danger is too great, especially to the youth of this state at a time when the psychedellic experience is the 'in thing' to so many, for this Court to yield to the arguments that the use of marihuana, for so-called religious purposes, should be permitted under the free exercise clause.
>
> We are of the opinion that the use of marihuana imposes a substantial risk to health and life, and that there is no possible justification for the use of same in the name of religious freedom."

See also State v. Massey (1949), 229 N.C. 734, 51 S.E.2d 179; Hill v. State, (1956), 38 Ala. App. 404, 88 So.2d 880; People v. Woodruff, (1966) 26 A.D.2d 236; U. S. v. Hudson (1970 431 F.2d 468 Cert. Denied, 400 U.S. 1011, 27 L.Ed.2d 624, 91 S.Ct. 575.

Appellants have not, of course, attacked the court's finding that peyote was a dangerous drug, nor could they, in light of Dr. Seever's testimony. While appellee at all times maintained that the gathering at Parks, Arizona, was not a religious meeting, it asserted, and the court agreed, rightfully so, that even if it were a religious meeting, the State of Arizona has a compelling interest in the regulation of peyote which would override any religious freedom argument. The Arizona Legislature determined in 1923 that peyote was a dangerous substance and enacted a statute prohibiting its use and possession. (See A.R.S. § 36-1061 for history) The statute applies equally to all individuals. There are no exceptions provided for anyone.

It is interesting to note that in all the cases cited by appellants, the courts' decision was based in part on the fact that the people were Indians, that the Native American Church is an Indian Church and that Peyotism is an Indian ritual.

ARGUMENT II

Is it a denial of due process to appellants for the State not to prosecute others committing the same acts based on racial grounds or for others to be acquitted of the same charge for no better reason than those which apply to appellants?

This question is improperly raised for the first time on appeal. It is an axiomatic principle of law that the appeals court will not consider a question which is presented for the first time on appeal or a new theory of the case not presented at the trial of the matter. See Weston v. State, ex rel. Eyman, 8 Ariz. App. 58, 442 P.2d 881 (1968); Milam v. Milam, 101 Ariz. 323, 419 P.2d 502 (1966); Roberson v. U.S., 382 F.2d 714 (1967); and Navajo County v. Four Corners Pipe Line Co., 12 Ariz. App. 348, 470 P.2d 496 (1970).

Appellants at no time during the trial of this matter urged the aforementioned question. It is patently clear that they are now urging it only as an afterthought, since it was and is not the theory upon which the case was tried. There was never any evidence presented in support of this contention nor any authority cited. It is interesting to note that even in their brief appellants can cite no authority in support of their contention.

The question appears in only two places, in appellants' closing argument and as a brief paragraph

in their post-trial memorandum. It is submitted this brief mention did not present the issue properly to the court below.

The fact that the Indian participants were not prosecuted and charges were dismissed as to them, has no bearing or relationship as to these appellants. Appellants would seem to be urging the novel argument that if they are to be prosecuted, then so should everyone else at the gathering at Parks on October 18.

They cite no authority showing they have a right to such prosecution. It is within the sound discretion of the duly elected County Attorney as to when a prosecution should proceed or when charges should be dismissed.

This court could take judicial notice that there are many and varied reasons which would lead to the dismissal of criminal charges against a particular person by the prosecuting attorney.

The question as framed is glaringly erroneous. No one was acquitted of any charges arising from the gathering at Parks. Acquittal or conviction is solely the province of the trier of fact.

What transpired in Attakai, supra, has no applicability here. There is nothing offered during trial which would show any similarity between the facts of Attakai and the facts here. This argument is so ludicrous as to merit no further consideration.

The charges against the Indians were dismissed but not on any religious or racial grounds. Appendix A attached hereto is the correction of the erroneous minute entry attached in appellants' brief. As the court can see, the dismissal was not predicated on

racial or religious grounds. Attached as Appendix D is a copy of the stipulation and order of dismissal of the Federal suit by the Indians referred to in appellants' brief. Again the court can see that the dismissal was not predicated on religious or racial grounds.

The argument that appellants have pending a Federal lawsuit and, therefore, should not be prosecuted has absolutely no merit. There apparently has been filed in Federal Court some sort of complaint. However, since the time of that filing, more than a year ago, no one allegedly named as a defendant has been served. Of further interest to this court is the fact that everyone present at Parks on October 18 appears as a plaintiff, including the Indians. These pleadings are not part of the record and this argument is for the first time now being urged seriously.

Appellants have completely ignored throughout their brief the overriding and compelling interest of the State. They have also failed to show that the statute is applied unequally. The statute applies to all regardless of race or religious belief. Again, this argument was not raised in the trial of this matter. They presented no evidence or testimony nor cited any authority in support of this contention. The argument is groundless and should not be considered by this court.

Appellants have appealed from the judgment and opinion of the lower court, Appendix B. A brief perusal shows this decision was not founded on any unequal protection argument, since none was urged by appellants.

CONCLUSION

It has been shown clearly at the trial and from all authority cited that the State has an overriding and compelling interest in the regulation and prohibition of the use of peyote. Peyote is a drug dangerous to society and the people of this State and in balancing the interest of the appellants and that of the State, the State must prevail. This court should, therefore, affirm the trial court's opinion and ruling and uphold the constitutionality of A.R.S. § 36-1061.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1572

THE STATE OF ARIZONA, Petitioner,

vs.

JANICE WHITTINGHAM and
GREG WHITTINGHAM, Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF ARIZONA DIVISION ONE, DEPARTMENT A

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TO: The Honorable Chief Justice and Associate Justices of the United States Supreme Court.

This Brief in Opposition omits any reference to: Opinion Below, Jurisdiction, Questions Presented and Constitutional Provisions and Statutes Involved. It contains a Statement of the Case, Argument and Conclusion.

STATEMENT OF THE CASE

Respondents believe that the statement of facts made by the trial judge in his memorandum opinion (Appendix 3a and 4a) is a good and succinct statement of the facts which really matter:

> "On October 18, 1969 a group of over forty people, some of whom appeared to be Indians and other non-Indians, gathered together in a building on the property of one Andrew Scott situated in the Town of Parks, Coconino County, Arizona in an area not within the boundaries of an Indian Reservation. The purpose of the meeting was to perform a religious ceremony to bless the marriages of the defendants Janice Whittingham and Greg Whittingham and another couple. The couples had been previously married in civil proceedings in the State of California. Although neither Mr. or Mrs. Whittingham appeared to be of Indian descent, Mrs. Whittingham testified, without rebuttal, that her grandfather was a full-blooded Blackfoot Indian.
>
> During the ceremony at Parks, police officers arrested those present, including the Defendants Whittingham, who were subsequently charged with having violated Section 13-1061, Arizona Revised Statutes, which prohibits the possession of peyote."

ARGUMENT

What Petitioner seeks to do is to have this Court examine a substance (peyote), not a principle (religious freedom).

Petitioner really asks this Court to review the very extensive record of this case and thereupon conclude (contrary to the Arizona Court of Appeals) that peyote is so potentially harmful to human beings that the State may prohibit its possession for any purpose whatsoever.

In order to reach its goal, Petitioner will ask this Court to accept narrowly the selected testimony of its key witness, Maurice Seevers. In the trial of the action this witness stated his beliefs (based on unpublished animal studies made 16 years earlier). The Arizona Court of Appeals reviewed this testimony and concluded the following about Seevers' testimony:

> "In essence, the testimony does substantiate the State's contention that

the excessive [emphasis added] use of peyote might be [emphasis added] attended by certain ill effects or damage to humans. However, we take judicial notice of the fact that many products are marketed universally and yet if ingested in unusually large amounts can be harmful, to wit, aspirin and alchohol."

The Court went on:

"Furthermore, the State failed to prove that the quantities of peyote used in the sacraments of the Native American Church are sufficiently harmful to the health and welfare of the participants so as ' . permit a legitimate intrusion under the State's police power." Page 22a of Petitioner's Appendix.

This conclusion of the Court of Appeals is amply supported by Mr. Seevers' own testimony, lines 6-24, p. 898, T.R., Vol. VI:

"Q Do you agree with the following statement, Doctor: From what we can find out in our studies peyote is not nearly as bad as sleeping pills or drugs of that type?

A I agree. I think I made the statement.

Q Yes. I think you did, too, before the Navajo Council.

A Right.

Q Continuing: 'And yet the United States Government has not seen fit to declare alcohol illegal. And from our studies and what we can find out both alcohol and sleeping pills have a much worse effect on the individual than peyote.'

A They do.

Q Do you agree with that statement today?

A I agree with the fact that they are more dangerous than peyote."

From the foregoing it is clear that peyote is a substance less dangerous than alcohol. The example of alcohol is helpful in drawing an analogy. The potential for abuse of alcohol is well known: excessive consumption has many ill effects and causes many social problems. For this reason, states have regulated its uses, governing the places where it may be sold, the hours of sale, and the age of those who may consume it. From 1919 to 1933, its possession was banned by Federal Prohibition. But in a religious setting, ingestion of alcohol occurs on unlicensed premises,

at irregular hours (it cannot be sold on Sunday mornings in Arizona, for instance), and it may be imbibed by minors. These things would all occur where wine was taken as a sacrament during the communion ceremony. This religious use of alcohol was also exempted from the 1919-1933 Federal Prohibition.

As mentioned in Petitioner's petition, peyote is considered to be in a special category in the federal regulations. Various authorities seem to acknowledge the harmlessness of peyote properly used.

The trial court found that:

> "It is true that the use of peyote in bona fide religious ceremonies of the Native American Church is exempted under Federal Food and Drug Regulations. Also the Bureau of Indian Affairs has legalized peyote for religious use on certain Indian Reservations, including the Navajo Reservation. Further, certain states have, by statute legalized peyote for religious use." Appendix 9a.

Respondent adds to this the fact that other states

have found a similar exemption through case law, as California in People v. Woody, 61 Cal.2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964), and now Arizona in the instant case.

The outcome of the case at bar is that Arizona's law is now consistent with all of the above examples. The statutory law - making it a misdemeanor to possess peyote - has had an exception applied to it by case law.

The exception is that a person may possess peyote if he shows that it is used:

> ". . . in connection with a bona fide practice of a religious belief; that it was an integral part of the religious exercise; and that it was used in a manner not dangerous to the public health, safety or morals." Appendix 25a.

By this ruling, there exist sufficient safeguards in both directions: the sincere participant in a safe religious practice where peyote is an integral part of the religion may practice his belief; on the other hand, the state is protected against free use of

the substance by those who are on a lark of their own.

Other cases cited by the Petitioner deal with bogus religions, different substances, or are otherwise different. None deals with use of peyote in a bona fide ritual of the Native American Church. No other case deals with an established, recognized religion of long standing where the practice is an essential element. In the 100 years since Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244 (1878), for instance, the Mormon Church has demonstrated that it can successfully function without polygamy, but the Native American Church cannot exist without peyote.

As the Court of Appeals pointed out:

> ". . . the use of peyote during a 'meeting' is a central force and the theological basis of Peyotism. Peyote constitutes, in and of itself, an object of worship. Without it the sacraments of the Native American Church are obliterated. Therefore, it seems apparent from the record that believers who worship at the Native American Church cannot freely exercise their religious beliefs absent the use of peyote." Appendix 19a.

In summary, peyote is a relatively harmless substance which is used in a safe manner in the rituals of the Native American Church and is essential to the religion. The Arizona Court of Appeals acted properly in allowing possession of peyote for such religious use.

Petitioner also raises secondary issues, such as whether there was a bona fide religious ceremony and whether Respondents were sincere participants. Obviously this is a question of fact and not a proper matter to engage this court's attention through certiorari.

The trial court, after seven and one-half days of trial concluded as to these issues:

> "The purpose of the meeting was to perform a religious ceremony to bless the marriages of the defendants Janice Whittingham and Greg Whittingham and another couple." Appendix 3a.
>
> ". . . the ceremony . . . substantially followed the recognized form of a service of the Native American Church

and was conducted and presided over by a Road Crew and Road Chief who had traveled from the Navajo Indian Reservation for that purpose." Appendix 7a.

". . . the Court finds that the Defendants Whittingham were serious and sincere participants in what they considered to be a ceremony having religious significance, which was conducted for the purpose of blessing their marriage." Appendix 7a.

On the same point, the Court of Appeals stated:

". . . the record before this Court does not give us pause to doubt the appellants' [Whittinghams'] sincerity." Appendix 24a.

Also the Court of Appeals said:

". . . we feel. . . that the defendants were sincere participants in what appeared to be a meeting of the Native American Church." Appendix 25a.

Petitioner also suggests that the Native American Church is open only to Indians. As to this issue, the trial court found:

". . . membership to persons who are not members of Indian Tribes or do not have Indian heritage, is usually not refused." Appendix 5a.

In its concluding paragraph, Petitioner asks this Court to grant certiorari, suggesting that the Court will be able to end confusion concerning freedom of religious practice. Respondent believes that the present law is sufficient: namely, that religious practices may not be curtailed unless they are sufficiently harmful to society as to justify police power intervention. Beyond this point, one can only examine the particular practice involved to determine its harmfulness or potential for harm. There really is no escaping a case-by-case approach.

The Court of Appeals took into account peyote's potential for abuse by holding it may be possessed for religious use if "used in a manner not dangerous to the public health, safety or morals." Appendix 25a. Clearly the State should not be allowed to intervene where there is no danger, but could restrict the religious practice only where peyote was being used in a manner which was dangerous to public health,

safety or morals.

The principle is soundly established and would not be changed by a review of this case. The task of the Court would reduce itself to examining the record to see whether the use of peyote in the said religious ritual does or does not occur in a manner which is dangerous to the public health, safety or morals. In other words, the Court is being asked to decide a question of fact, not of law.

CONCLUSION

Peyote is a unique substance uniquely used in a unique religion. This case would be a poor vehicle for the establishment of broader principles.

Therefore, certiorari should be denied.

RESPECTFULLY SUBMITTED this 14 day of May, 1974.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1572

THE STATE OF ARIZONA, Petitioner,

vs.

JANICE WHITTINGHAM and
GREG WHITTINGHAM, Respondents.

BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF ARIZONA DIVISION ONE, DEPARTMENT A

Respondents assert that a drug that can cause convulsions and death, that also contains other alkaloids about which little was known except that the smallest quantity would cause death within three minutes, is "relatively harmless", and that its use here was safe.

Respondents have never challenged the legitimacy of petitioner's right to regulate the use of this potentially harmful substance having no known medical use or benefit. If, as respondents assert, this substance is so relatively harmless, less dangerous than alcohol or aspirin, why then did they not challenge the petitioner's right to regulate the substance in the first place? Why didn't they contend that there is no legitimate purpose whatsoever to be served by the regulation of this substance by petitioner?

What respondents instead urge is that the Arizona Court of Appeals decision is correct because it now recognizes an exception by case law to the misdemeanor statute, A.R.S. § 36-1061, and further that Arizona is now in accord with two cited examples of an exception for the use of peyote -- California and the Federal Regulations. They did not, however, cite the Court to those jurisdictions not recognizing any exception, such as North Carolina v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966) and the strong indication by the Court in People v. Crawford, 328 N.Y.S.2d 747, 69 Misc.2d 500 (1972). Respondents also say this decision is correct because the manner in which this dangerous drug was used is "safe", the drug is not addictive, and therefore not subject to abuse, even though it has a great potential for harm. The abuse of the substance was noted for this Court in the petition and was a specific finding of fact by the trial court. (See Appendix B, p. 9a)

It is submitted that in fact Arizona is not now in accord with any other jurisdiction, but the

exception which has been recognized by some other jurisdictions has been extended to the point that the door has now been flung wide open.

Under the Arizona Court's decision the test for an exemption is simply (1) the bona fide practice of a religious belief, (2) the use as an integral part of the religious exercise (practice), and (3) the use in a manner not harmful to the public health, safety or morals. (See Appendix C, p. 25a). This Court in Gillette v. United States, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971), cited with approval Clark, Guidelines for the Free Exercise Clause, 83 Harv. L. Rev. 327 (1969). Mr. Clark has noted at page 335 the problem inherent in applying the first part of the test outlined by Arizona's Court:

> ". . . there remain two other variables which may affect the court's estimation of the governmental interest. One is the difficulty of distinguishing truly religious objectors from those making false claims. Justice Brennan was able to minimize this problem in Sherbert, since Sabbatarianism is usually associated with other well defined religious beliefs and practices. In different contexts, however, the problem may prove more compelling. In United States v. Leary, the Fifth Circuit expressed concern that the religious use of marijuana

> by some individuals would give rise to fraudulent claims of privilege or greater ease of access to the drug by those not using it for religious purposes:
>
> * * *
>
> In a number of areas where religious beliefs overlap with secular self-interest, and where the sincerity of religious belief may be harder to define than the sectarian belief in the sanctity of the Sabbath, the government may invoke both administrative difficulty and the broad possibility of error as legitimate factors militating against an exemption."

It is clear, as was the case here, that in the face of simple testimony expressing a belief it is a virtual impossibility to disprove that belief and therefore the practice of that belief.

The second part of the test requires only that the use be an integral part of the exercise and not that it rise to the degree of importance that formed a part of the basis for the decision in People v. Woody, 61 Cal.2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). As Mr. Clark stated at page 362:

> ". . . In People v. Woody[133] the California Supreme Court held that the Native American Church, a

> religious assembly of American Indians, is entitled by the free exercise clause to the use of peyote in religious ceremonies. The court emphasized the essential nature of peyote in the religious life of the Indians:
>
> * * *"
>
> (Emphasis added)

It seems that the Arizona Court in using the term "exercise" is referring to the practice of a religion as opposed to the belief in a religion. Petitioner submits that the incorporation of a dangerous activity into a religious practice has never been recognized as affording that dangerous activity constitutional protection under the free exercise clause.

The burden the Arizona Court has placed on petitioner as it pertains to the third part of the test, i.e., that peyote was used in a manner not harmful to the public health, safety or morals, now is equally insurmountable. It is not enough to show that the substance causes bizarre distortions of perception resembling the symptoms of psychotic behavior, or that it can cause convulsions and death, or that it is subject to abuse. (See Appendix B, pages 6a & 8a). Petitioner must now show that it is "addictive" and apparently that during its use persons actually convulse and die.

Under the test as now set forth by the Arizona Court, enforcement of A.R.S. § 36-1061 becomes impossible and its purpose, the control

of "dangerous drugs", is defeated.

Respondents remark that petitioner is claiming that the Native American Church is open only to American Indians. Nothing could be further from the truth. It is obvious that the reason an exemption has been recognized in jurisdictions other than Arizona is because the users of peyote were a small group of American Indians confined to the Native American Church. As Mr. Clark noted in his article, supra, at page 332, the relatively small number of persons asserting the privilege was important in this Court's decision in Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963):

> ". . . In Sherbert v. Verner itself, the Court defined the governmental interest as that in assuring that enough money would be left in the unemployment fund to support claimants against it, and in assuring that employers would not be seriously inhibited in scheduling necessary Saturday work;[28] the possible number of claimants of the privilege figured centrally in the majority's discussion. . . ." (Emphasis added)

Mr. Clark also pointed out:

> ". . . A religious privilege to smoke marijuana might be workable if only a handful of persons in the United States could establish the requisite

religious interest, but absent assurance of this the right probably does not exist. . . ."

Finally petitioner would ask this Court to note the complete silence and absence of any mention whatsoever by respondents of either the denial of equal protection problem presented by the Arizona Court's ruling or the conflict with the Establishment Clause of the First Amendment. Respondents have completely ignored and have made no response to those questions. Petitioner believes that in view of the Arizona Court's decision and all the decisions concerning the Native American Church, the governmental neutrality mandated by the Establishment Clause of the First Amendment, as set forth in Gillette, supra, no longer exists.

CONCLUSION

The crux of the problem is simply that the personal interest of an individual cannot be determined by the Court and therefore the governmental interest must be. By granting the exemption, the Arizona Court has not only effectively defeated the purpose of A.R.S. § 36-1061 and made enforcement impossible but has seriously jeopardized the purpose and enforcement of all other statutes regulating dangerous substances, such as marijuana or LSD.

For all the foregoing reasons, together with those set forth in the petition, the Court should issue a writ of certiorari to review and reverse the order and opinion of the Court of Appeals, State of Arizona, Division One, Department A.

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